A-561

SUPREME COURT OF THE UNITED STATES

_____Term,_____

No. 76-1459

EDMOND PFOTZER and E. JOHN PFOTZER
Individually and as co-partners
Doing business as E. & E. J. Pfotzer,

Petitioners,

v.

AMERCOAT CORPORATION, and
THE CITY OF NORWALK, CONNECTICUT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

EDMOND PFOTZER and E. JOHN PFOTZER
Petitioners pro se

P. O. Box 987
Wilmington, Delaware 19899

Tel: (302) 571-0595

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EXHIBIT NO.

SUPREME COURT OF THE UNITED STATES

_____Term,_____

NO._____

EDMOND PFOTZER AND E. JOHN PFOTZER
Individually and as co-partners doing
business as E. & E. J. Pfotzer,
Petitioners,

v.

AMERCOAT CORPORATION, AND
THE CITY OF NORWALK, CONNECTICUT,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT (HARTFORD) OF THE STATE OF CONNECTICUT

EDMOND PFOTZER, AND
E. JOHN PFOTZER
Petitioners pro se

P. O. Box 987
Wilmington, Delaware

Tel: (302) 571-0595

Petitioners Edmond Pfotzer and E. John Pfotzer respectfully pray that a writ of certiorari issue to review the final decision of the Supreme Court of Connecticut entered in this proceeding on October 13, 1976; and its denial on November 3, 1976, of appellants' motion for reargument.

OPINION BELOW

No opinion was rendered in the Supreme Court of the State of Connecticut, nor in the Superior Court of the State of Connecticut. (See Appendix below at 1a and 2a filed herewith.)

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of TITLE 28, UNITED STATES CODE, Section 1257 (3). The Supreme Court of the United States by letter dated January 13, 1977 granted an extension of time in which to file a petition for writ of certiorari to and including April 2, 1977.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Connecticut illegally deprived petitioners of their inviolate right of Trial by Jury as guaranteed by Amendment VII of

of the Constitution of the United States of America by denying petitioners Trial by Jury of their third party action as had been previously granted petitioners, following petitioners' appeal to the Supreme Court of Connecticut from the Superior Court's denial thereof?

2. Whether the Supreme Court of Connecticut illegally deprived petitioners of the protection, privileges, and rights guaranteed them by Article IV - Section 1., of the Constitution of the United States of America, by refusing to accord the prior critical judicial orders of the United States District Courts of the States of Connecticut and Delaware their "Full Faith and Credit...and Judicial Proceedings" as stemming from their lawful jurisdiction; and thereby precluding petitioners from litigating in the Su-

perior Court of Connecticut petitioners' actions as had been therebefore dismissed with prejudice by the said Federal Courts as predicated on the voluntary stipulation of petitioners and respondents in accord with their prior voluntary enabling stipulation as entered in open court, Superior Court of Connecticut, with the said court being a party to the contract by stipulation, to consolidate and litigate the then pending federal actions with the primary state action, and as a consequence of which deprivation the entire state action was not litigated?

3. Whether the Supreme Court of Connecticut illegally deprived petitioners of due process of law as guaranteed by Amendment XIV. Section 1. of the Constitution of the United States of America by knowingly permitting, and sanctioning the

respondent, Amercoat Corporation, to commit a fraud upon the Superior Court, and subsequently again upon the Supreme Court of Connecticut; and by which fraud petitioners were precluded on July 13, 1973, from filing an essential amended answer and counterclaim in the involved action; and as a direct consequence of said fraud, the entire action was ultimately not litigated?

4. Whether the Supreme Court of Connecticut illegally deprived the petitioners of due process of law as guaranteed by Amendment XIV. Section 1. of the Constitution of the United States of America, by knowingly permitting and sanctioning the respondents', Amercoat Corporation and City of Norwalk, fraud in the inducement, and breach of a voluntary stipulation entered on the record in open

court on September 9, 1974, with the affirmative concurrent agreement of the State Referee of the Superior Court; and as a consequence of which said fraud and breach, the petitioners were precluded from reinstating their essential amended answer and counterclaim filed July 13, 1973 in the involved state action, and ultimately culminating in the entire action not being litigated?

5. Whether the Supreme Court of Connecticut illegally deprived petitioners of due process of law as guaranteed by Amendment XIV. Section 1. of the Constitution of the United States of America, by condoning the ex parte action of a Superior Court judge in recommending, and permitting respondent, Amercoat Corporation, to withdraw its primary complaint against these petitioners, and collaterally recom-

mending, and permitting respondent, City of Norwalk, as a quid pro quo to withdraw its third party cross-complaint against respondent Amercoat. The foregoing as following six and one half years of costly, and burdensome litigation, including two trials restricted to respondent's, Amercoat's, primary action, and as over petitioners' (Pfotzers') timely objection and exception, and motion to vacate respondents' collusive withdrawal supra; the consequence of which was to preclude a trial of petitioners' entire case?

6. Whether the Supreme Court of Connecticut illegally deprived petitioners of due process of law as guaranteed by Amendment XIV. Section 1. of the Constitution of the United States of America by refusing to docket petitioners' appeal, and thereby hear and consider petitioners'

collateral "Assignment of Errors"; and as involving petitioners' rights to timely statutory notice of all prior decisions, orders, and rulings in the action, and the Supreme Court of Connecticut thereby deprived petitioners of "due process" as involving an ultimate hearing on the involved merits?

STATUTES INVOLVED

UNITED STATES CONSTITUTION

ARTICLE IV - Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

AMENDMENT VII.

In suits at common law, where the

value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV - Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONNECTICUT CONSTITUTION CITED:

"ARTICLE 1, SEC. 19. The right of trial by jury shall remain inviolate."

CONNECTICUT GENERAL STATUTES CITED:

SEC. 52-215. - Jury Trials.

And which provides in relevant part:

"* * * The folling-named classes of cases in the Superior Court * * * shall be entered in the docket as jury cases upon the written request of either party made to the clerk within thirty days after the return day: * * * and, except as hereinafter provided, civil actions involving such an issue of fact, as prior to January 1, 1880, would not present a question properly cognizable in equity. When, in any of the above-named cases or in any civil case triable by jury under the provisions of Section 51-266, an issue of fact is joined, the case may, within ten days after such issue of fact is joined, be entered in the docket as a jury case upon the request of either party made to the clerk * * *. All issues of fact in any such case shall be tried by the jury, * * *." (emphasis supplied)

SEC. 52-130. - Amendments.

And which provides in relevant part as set out under Sec. 132 of Connecticut

Practice Book captioned:

Amendment by Consent, Order of Court, of Failure to Object (Amended June 1, 1970, to take effect Sept. 1, 1970.)

A party may amend his pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner:

(a) by consent of the adverse party; or

(b) by order of court; or

(c) by filing a motion for leave to file such amendment, with a copy of the proposed amendment appended, after service upon each party as provided by Sec. 80, and with proof of service endorsed thereon. If no objection thereto has been filed by any party within ten days from the date of the filing of said motion, the party filing such motion shall file the amendment appended to the motion as a separate pleading. If an opposing party shall have objection to any part of such motion or amendment appended thereto such objection in writing, specifying the particular paragraph or paragraphs to which there is objection and the reasons therefor, shall, after service upon each party as provided by Sec. 80 and with proof of service endorsed thereon, be filed with the clerk within the time specified above and placed upon the next short calendar list.

The court may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial. If the amendment occasions delay in the trial or in-

convenience to the other party, the court may award costs in its discretion in his favor. (P. B. 1951, Sec. 92; see Gen. Stat., § 52-130 and annotations; 1963.) (Amended June 1, 1970, to take effect Sept. 1, 1970).

SEC. 52-80. - Nonsuits and withdrawals; costs.

If the plaintiff, in any action returned to court and entered in the docket, does not, on or before the opening of the court on the second day thereof, appear by himself or attorney to prosecute such action, he shall be nonsuited, in which case the defendant, if he appears, shall recover costs from the plaintiff. The plaintiff may withdraw any action so returned to and entered in the docket of any court, before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action, or any other party thereto may withdraw any cross complaint or counterclaim filed therein by him, only by leave of court for cause shown. (1949 Rev., S. 7801.)

SEC. 52-81. - Costs taxable on withdrawal.

Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise; but such judgment shall not be rendered after the ex-

piration of six months from the date of such withdrawal; and no costs shall be allowed which accrued after actual notice in writing of the withdrawal was given by the plaintiff to the defendant or his attorney, unless good reason therefor is shown to the court. (1949 Rev., S. 7802.)

SEC. 51-53. - Court Clerks.

And which provides in relevant part as set out under Sec. 317 of Connecticut Practice Book captioned:

Sec. 317. Notice to Referees and Attorneys. (Amended June 26, 1972, to take effect Oct. 1, 1972.)

The clerk shall give notice to each referee of a reference to him and to the attorneys of record of all judgments, nonsuits, defaults, decisions, orders and rulings made concerning pending cases and shall note on the docket the date of the issuance of such notice. In case of appellate proceedings thereon, the time limited by law for commencing such proceedings shall date from the time when such notice is issued by such clerk. (P.B. 1951, Sec. 198; see Gen. Stat., § 51-53 and annotations; 1963.) (Amended June 1, 1964, to take effect Sept. 1, 1964; amended June 26, 1972, to take effect Oct. 1, 1972.)

Sec. 78A. - Impleading of Third Party by Defendant in Civil Action

A defendant in any civil action may move the court for permission as a third-party plaintiff to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Such a motion may be filed at any time before trial and such permission may be granted by the court if, in its discretion, it deems that the granting of the motion will not unduly delay the trial of the action nor work an injustice upon the plaintiff or the party sought to be impleaded. The writ, summons and complaint so served shall be equivalent in all respects to an original writ, summons and complaint, and the person upon whom it is served, hereinafter called the third-party defendant, shall have available to him all remedies available to an original defendant, including the right to assert setoffs or counterclaims against the third-party plaintiff, and shall be entitled to file cross complaints against any other third-party defendant. The third-party defendant may also assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim and may assert any claim against the plaintiff arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff, within twenty days after the third-party defendant appears in the action, may assert

any claim against the third-party defendant arising out of the transaction or occurrence which is the subject matter of the original complaint, and the third-party defendant, as against such claim, shall have available to him all remedies available to an original defendant, including the right to assert setoffs or counterclaims against the plaintiff. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him for all or any part of the third-party plaintiff's claim against him. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so. When any civil action in which such a third party has been brought in is reached for trial, the court hearing the case may order separate trials of different parts of the action and may make such other order respecting the trial of the action as will do justice to the parties and expedite final disposition of the case. (Adopted June 2, 1969, to take effect Sept. 2, 1969.)

Sec. 600. - Right of Appeal

If a party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, or in arrest of judgment, or the granting or denial of a motion under Sec. 255 for judgment notwithstanding the verdict or notwithstanding the failure of the jury to return a

verdict, he may appeal from the final judgment of the court or of such judge, or he may appeal from a decision setting aside a verdict or from the denial of a motion to set aside a nonsuit or from the denial of a motion for judgment notwithstanding the failure of the jury to return a verdict. (P. B. 1951, Sec. 377; 1963.)

Sec. 601. - Time to Appeal; Extension

The party appealing shall, within twenty days from the issuance of notice of the rendition of the judgment or decision from which the appeal is taken, file an appeal with the clerk of the court where the judgment was rendered or the decision was made (in appropriate part supra).

Sec. 697. - Motion to Dismiss

Any claim that an appeal or writ of error should be abated or dismissed, whether based on lack of jurisdiction, failure to file papers within the time allowed, failure to prosecute with proper diligence or any other ground, shall be made by a motion to dismiss the appeal or writ. Any such motion must be filed in accordance with Secs. 687 to 689 inclusive within ten days after the filing of the appeal or the return day of the writ, or if the ground alleged subsequently occurs, within ten days after it has arisen, provided, a motion based on lack of jurisdiction or a failure to prosecute with proper diligence may be filed at any

time. (P. B. 1951, Sec. 436; 1963.)

Sec. 702. - Motions to Reargue

Sec. 703. - Filing and Distribution; Contents

A motion for reargument will not be entertained unless filed in writing within ten days from the date when the decision is announced. The motion shall be filed with the reporter of judicial decisions and eight copies shall be filed with the clerk of the court where the case was tried, who shall send one copy to each of the justices of the supreme court, one copy to the clerk of this court for Hartford County, unless the motion is filed with him, and one copy to opposing counsel; and the clerk of the court where the judgment was rendered shall also notify the reporter of judicial decisions that the copies have been filed with him. The motion shall state briefly the grounds for asking a reargument and need not be printed. (P. B. 1951, Sec. 441; 1963.) (Amended Oct. 15, 1968, to take effect Jan. 1, 1969; amended May 23, 1973, to take effect Sept. 4, 1973.)

Sec. 704. - Stay of Proceedings and Assignment for Reargument

Unless the chief justice shall otherwise direct, all proceedings to enforce or carry out the judgment shall be stayed until the time for filing the motion has expired, and, if the motion is filed, un-

til its disposition, and, if it is granted, until the appeal is finally determined.

If such a motion is granted, the clerk of this court in the county where the judgment was rendered shall give notice to the parties and the case will be assigned for hearing on the next day for the assigning of cases, unless it is continued by stipulation or order of court. (P. B. 1951, Sec. 441.)

STATEMENT OF THE CASE

Petitioners, Pfotzers, are of the belief that the court should not be obliged to evaluate the subject petition without an adequate factual background on which to base its consideration and decision whether to grant the writ of certiorari.

Such extensive factual background[1] is considered essential for pertinent reference, and is provided at the sacrifice of brevity and of the inclusion of other material additions to plaintiffs' peti-

[1] In the absence of the repetitively requested court record.

tion. The factual background is necessary because of the unusual legal developments which progressively stemmed from the original action and from which the several issues presented arose. Accordingly, the court is pertinently informed that:

Amercoat Corporation, one of the two respondents herein, is the plaintiff in Civil Action No. 14326, as commenced in the Superior Court of the State of Connecticut, on October 6, 1969, against Transamerica Insurance Company, and the co-defendants, Edmond Pfotzer and E. John Pfotzer, a partnership trading as E. & E. J. Pfotzer, generally referred to as the petitioners herein. The petitioners are also the third party plaintiffs in the action by virtue of having cited the second respondent, City of Nor-

walk, into the action as a third party defendant; following the City of Norwalk's refusal to appear and defend against respondent, Amercoat Corporation, the plaintiff in the primary action. Pursuantly:

1) Respondent's, Amercoat Corporation's, primary complaint in Civil Action No. 14326 in the Superior Court of Connecticut, supra, sought recovery against petitioners (Pfotzers), for certain underground piping material it had supplied them, and as also against co-defendant, Transamerica Insurance Co., on its performance bond. Pertinently, the petitioners had been previously directed in writing, by respondent, third party defendant, City of Norwalk, to install underground, respondent Amercoat Corporation's piping material. The latter in

connection with petitioners' (Pfotzers') general contract with the City of Norwalk as involving the construction of alterations and additions to the City's existing sewage treatment plant. The respondent City of Norwalk's written directions (orders) to the petitioners (Pfotzers) necessarily performing as the respondent City's agent in the subject transaction, had followed extensive prior negotiations, as exclusively between respondent Amercoat Corporation, and respondent third party defendant City of Norwalk. In said negotiations, respondent Amercoat allegedly warranted its piping material exclusively to the respondent City of Norwalk for the specific purpose intended by the City of Norwalk as under the construction conditions and specifications involved, and which alleg-

edly had been made known to respondent Amercoat, by respondent City of Norwalk.

2) Subsequent to petitioners' installation of respondent Amercoat's piping material (as under Amercoat's constant field supervision), Amercoat's pipe failed. The latter failure in that Amercoat's pipe material did not, and could not, perform or serve the specific purpose for which the respondent, third party defendant City of Norwalk, had in writing directed the petitioners to order said piping material from Amercoat. Following the failure of respondent Amercoat's pipe material, the respondent, third party defendant City of Norwalk, thereafter in writing instructed and ordered petitioners not to pay respondent Amercoat for the pipe material which Amercoat had supplied the petitioners, as

on respondent City of Norwalk's written order to petitioners supra.

3) Petitioners (Pfotzers), following the failure of respondent Amercoat's underground piping material--the complete details of which underground piping failure were at all times intimately known to the City of Norwalk--were, on October 6, 1969, served by Amercoat with a summons and complaint for the book value of Amercoat's pipe material as supplied petitioners. Immediately following the filing of respondent Amercoat's complaint against the petitioners, the petitioners requested respondent City of Norwalk in writing, to take over the defense of respondent Amercoat's primary suit against the petitioners. The petitioners' foregoing request for the City of Norwalk to take over the defense of

Amercoat's suit was made inasmuch as petitioners had been acting as respondent City of Norwalk's agent in fact in the subject Transaction. Thereafter, following respondent City of Norwalk's refusal to take over the defense of respondent Amercoat's primary action, petitioners then seeking complete indemnification from the City of Norwalk, under the facts and circumstances involved as then completely known to the City of Norwalk, cited in the respondent City of Norwalk, as third-party defendant, and as liable over to plaintiff Amercoat Corporation in Civil Action No. 14326, supra.

4) Respondent, third party defendant City of Norwalk, following its refusal to take over the defense of Amercoat's primary action in Civil Action No. 14326, supra, and thereby indemnifying

the petitioners, did nevertheless, in its responsive pleadings, allege that petitioners had properly installed Amercoat's underground piping material in accord with Amercoat's instructions and under Amercoat's field supervision. The respondent City of Norwalk also alleged that respondent Amercoat's piping material was defective for the purpose intended and which had resulted in its subsequent failure; thus breaching respondent Amercoat's specific warranties and representations, as had been made exclusively to the respondent, third party defendant City of Norwalk. Further, in its answer, the respondent City of Norwalk included a cross-claim against respondent Amercoat, and a counterclaim against the petitioners (Pfotzers).

5) On June 18, 1973, the petition-

ers (Pfotzers), following extensive critical discovery disclosures in petitioners' separate action against the City of Norwalk (in the United States District Court for the State of Connecticut), filed their motion requesting the court's leave (in Civil Action 14326) to file an "Amended Answer and Counterclaim" against respondent Amercoat. The foregoing allegedly based on respondent Amercoat's fraud, deceit and misrepresentation, as involving its piping material sold to the petitioners (Pfotzers); and for all related damages stemming from the petitioners having installed said piping material in accord with respondent Amercoat's specifications; and for related damages flowing from the replacement of said respondent Amercoat's piping material with other and different piping material. Re-

spondent Amercoat made no timely objection to the filing of petitioners' (Pfotzers') said motion etc., and as a consequence of which petitioners' "Amended Answer and Counterclaim", filed in accord with Section 132 of the Connecticut Practice Book, as a matter of law under Connecticut General Statutes automatically became an integral part of the pleadings in the subject action.

Subsequently, however, respondent Amercoat's attorney, H. M. Lessin, Esq., was to fraudulently allege that he had not received petitioners' motion, and the attached "Amended Answer and Counterclaim" supra, as served on June 19, 1973, until July 16, 1973.

On July 20, 1973, Honorable A. Tunick, Judge, Superior Court, at a hearing of the "Short Calendar" elected to adopt

respondent Amercoat's attorney's fraudulent statement of his alleged non-receipt of petitioners' motion etc., served June 19, 1973, until July 16, 1973. The foregoing fraudulent statement was made despite petitioners' production of said counsel's certified mail receipt dated June 19, 1973. Nevertheless, the court summarily denied petitioners' (Pfotzers') said motion to "Amend and Counterclaim". The decision of July 20, 1973 supra was an interlocutory ruling, although involving petitioners' critical rights in the primary litigation. Accordingly, petitioners immediately appealed said adverse decision to the Supreme Court of Connecticut, and respondent Amercoat thereupon moved to dismiss, because petitioners' appeal allegedly was interlocutory.

Pursuantly, in argument before the Supreme Court of Connecticut, respondent Amercoat's counsel, H. M. Lessin, Esq., again with deliberate intent to mislead the Supreme Court of Connecticut, did fraudulently state he had not received petitioners' motion to file "Amended Answer and Counterclaim" until July 16, 1973. The Supreme Court of Connecticut pointedly disregarded respondent Amercoat's attorney's receipt of the certified mail service as dated July 19, 1973 as being relevant to the alleged interlocutory appeal. Thereupon, petitioners' (Pfotzers') appeal of the said Superior Court's denial of their motion to file a critical "Amended Answer and Counterclaim" was denied in turn summarily by the Supreme Court without opinion. The latter apparently on the grounds that it was an

interlocutory appeal. However, the same allegedly interlocutory appeal was made a part of petitioners' appeal of April 9, 1976 before the Supreme Court of Connecticut.

6) As of material significance in the progressive developments of the action, the record shows that on August 11, 1972, respondent Amercoat Corporation moved to dismiss petitioners' (Pfotzers') claim for trial by jury as had been timely requested on April 7, 1970.

On September 1, 1972, the Superior Court--W. Tierney, Jr., Judge--granted respondent's motion to dismiss petitioners' claim for trial by jury supra.

On September 20, 1972 petitioners (Pfotzers) appealed the denial of their inviolate constitutional right to trial by jury to the Supreme Court of Connecticut.

On January 15, 1974 the Supreme Court of Connecticut after a hearing denied petitioners (Pfotzers) a right to jury trial in the respondent Amercoat's primary case, but granted petitioners' right to trial by jury in petitioners' third party action.

7) A hearing on the merits of respondent Amercoat's primary action commenced before State Referee P. B. O'Sullivan on September 9, 1974; and at which time Amercoat presented and rested its case. Immediately thereafter, and prior to the petitioners (Pfotzers) as third party plaintiffs, and the respondent third party defendant, City of Norwalk, including the latter's cross-complaint against respondent Amercoat, proceeding to trial by jury in the third party action, all parties entered into a formal

stipulation. Said stipulation (enforceable contract) was entered on the record in open court, and as including the State Referee's collateral agreement, provided that the petitioners would withdraw their two derivative actions in the United States District Courts of Connecticut and Delaware, and that petitioners would further waive their right to a jury trial. Respondent Amercoat's, and respondent City of Norwalk's respective consideration for petitioners' (Pfotzers') agreement undertaking supra was that petitioners' "Amended Answer and Counterclaim" to respondent Amercoat's primary action would become a part of the pleadings. Correlatively State Referee, Hon. P. B. O'Sullivan supra agreed that he would hear and decide the entire action. The latter as including the third party ac-

tion as originally claimed for jury trial by the petitioners (Pfotzers).

The said entire action was then, by the State Referee's direction supra, continued to November 18, 1974, as in accord with the terms of the said stipulation as had been entered on the record in open court. Repeating in part, the hearing of the entire action, by the terms of the stipulation, was to include as a pleading, the petitioners' (Pfotzers') "Amended Answer and Counterclaim", as had been originally filed by motion on June 18, 1973; and would include the complete third party action, the latter as embracing the respondent's third party defendant's, City of Norwalk's cross-complaint against respondent Amercoat.

Subsequently, the respondent (Amercoat) thereafter unilaterally breached

the stipulation of September 9, 1974 supra and refused to proceed to trial on November 18, 1974, in accord with the terms of the stipulation, as had been entered on the record in open court; and with the State Referee, as an indispensable party thereto supra. Subsequently no mistrial was ever claimed; nor announced; nor sought by respondent Amercoat, by means of appropriate motion; nor recorded in connection with said trial of September 9, 1974, supra. However, on November 15, 1974, the State Referee moved for the revocation of reference. Petitioners (Pfotzers) were apprised of the revocation following the alleged hearing and granting of the revocation. No recording of the hearing, involving the said revocation was made. N. B. Petitioners had previously withdrawn their two federal court actions

supra.

8) On July 24, 1975, a second trial of Civ. Action No. 14326 was had on the merits, and before Honorable Harold H. Dean, Judge, Superior Court of Connecticut. The transcript of record shows that the trial was restricted by the court to respondent Amercoat's primary action; and over petitioners' repetitive exceptions; and without petitioners' "Amended Answer and Counterclaim of June 18, 1973" in the action as in accord with the stipulation of September 9, 1974 (Section 7 supra). This second trial of Civ. Action No. 14326, supra, restrictively on the merits of respondent Amercoat's primary action alone, resulted in a judgment in favor of the respondent Amercoat. Said judgment was reopened on September 29, 1975, by the court's ruling on petitioners' (Pfotzers') motion as served August 1, 1975.

9) Subsequently, on December 3, 1975, more than six years after respondent Amercoat Corporation had commenced its primary litigation of Civ. Action No. 14326 in the Superior Court of Connecticut, and after petitioners (Pfotzers), defendants therein, had been compelled to answer and make in excess of three hundred and eighty separate proceedings and responses, in four different courts, and as following two prior hearings restricted to the merits of respondent Amercoat's primary action herein, the respondent Amercoat sought to withdraw its action against the petitioners (Pfotzers).[1]

[1] The respondent (plaintiff-Amercoat) and respondent (third party defendant City of Norwalk) collusviely sought to withdraw their respective (cont'd next page)

Specifically, on December 3, 1975, respondent Amercoat, without any prior notification to these petitioners, at what had been scheduled to be a pre-trial conference pertinent to the trial of the primary action to the court, and of the third party action to the jury, sought to withdraw its action against petitioners (Pfotzers) in violation of Section 52-80 of the Connecticut General Statutes. The respondent Amercoat, by complaint and cross-complaint in the state action, in their attempt to vitiate both the primary action and third party action. The latter after having therebefore been informed by petitioners, defendants and third party plaintiffs (Pfotzers) that their cost to defend the entire action had to December 3, 1975, cost petitioners (Pfotzers) in excess of $55,000.00 (as the aforesaid respondent Amercoat and Respondent City of Norwalk, both well knew, and for which $55,000.00 the petitioners (Pfotzers) were seeking indemnity and correlated damages from both said two parties.) Refer to Section 3), supra.

obvious prearrangement, and as acting collusively with respondent City of Norwalk, third party defendant[2], attempted to effect the following procedures as set out in the transcript of the December 3, 1975 proceedings:

(a) Respondent Amercoat, without notice to petitioners, sought to restrictively withdraw its complaint against Edmond Pfotzer and Transamerica Insurance Company but otherwise leaving E. John Pfotzer in that action. The transcript record shows that respondent Amercoat did not in fact withdraw its action against herein petitioner E. John Pfotzer, and as over E. John Pfotzer's timely objection and exception to the entire proceedings. The court, Harold H. Dean, on the occasion informed petitioner E. John Pfotzer, that he had no standing to oppose the

[2] ibid.

attempted withdrawal.

(b) On December 3, 1975, the respondent City of Norwalk, third party defendant, likewise without notice to petitioners (Pfotzers), defendants and third party plaintiffs, and as acting collusively with respondent Amercoat, sought to withdraw its third party cross-complaint against the respondent Amercoat; and yet leaving standing its third party defendants' counterclaim against the petitioners (Pfotzers), defendants and third party plaintiffs in the third party action. The foregoing attempt at withdrawal was also made over petitioners' objection and exception.

10) On March 3, 1976, the respondent City of Norwalk, third party defendant, without prior notice to petitioners (Pfotzers), and in furtherance of its

collusive action with respondent Amercoat as was initiated on December 3, 1975 (Section 9 supra), withdrew its third party counterclaim against these petitioners and over petitioners' (Pfotzers') objection and exception. The aforesaid collusive action constituted a violation of Section 52-80 of the General Statutes of Connecticut and correlatively constituted a furtherance of the City of Norwalk's fraud in the inducement and breach of its contract (stipulation) of September 9, 1974 as was made on the record in open court before, and with State Referee P. B. O'Sullivan participating in said stipulation (Section 7 supra).

11) Subsequently, on March 16, 1976, the Superior Court of Connecticut, Harold H. Dean, Judge, prior to the commencement of an ostensible complete hearing of Civil

Action No. 14326; and without taking any testimony on the merits; and without attempting to impanel a jury on petitioners' (Pfotzers') third party action, ruled that the respondent Amercoat (plaintiff) and respondent third party defendant, City of Norwalk, having withdrawn their respective complaint and cross-complaint from the action, "there is nothing for this court to try", and that costs would not be assessed against any party. Exception to said ruling was taken by petitioners (Pfotzers).

12) On March 16, 1976, as a direct consequence of respondent Amercoat's counsel's deliberate fraud on the court, Section 5 supra; and correlatively of respondents' counsels' fraud in the inducement and breach of the stipulation of September 9, 1974, Section 7 supra; and as

coupled with respondents' collective fraud as was implemented on December 3, 1975, Section 9 supra; petitioners' "Amended Complaint and Counterclaim" of June 18, 1973 was ruled by the court as not being a part of the pleadings in Civil Action No. 14326.

Pertinently, the court had not issued an order, evidencing it had duly heard argument at a hearing of the "Short Calendar" as responsive to respondents' prior motions, duly noticed; and had thereafter permitted respondents' correlated and collusive withdrawals of December 3, 1975, "as by leave of court for cause shown", as in accord with Lucas v. St. Patrick's Roman Catholic Church Corp. 123 Conn. 168, 169, Bristol v. Bristol Water Co. 85 Conn. 673, (Section 9 supra) but had contrariwise on March 16, 1976, over petitioners' (Pfotzers') objection

and exception, initially issued an oral order, without any cause being shown, as retroactively permitted, nunc pro tunc, respondent Amercoat to withdraw its complaint against petitioners, and collaterally, permitted respondent third party defendant City of Norwalk to withdraw its cross-complaint in the third party action against respondent Amercoat Corporation. Thereafter, Judge Dean ruled that: inasmuch as Amercoat had withdrawn its action against petitioners (Pfotzers); and seeing that the petitioners, as a result of the foregoing actions, had no "Amended Answer and Counterclaim" against the respondent Amercoat; that hence there could be no potential indemnity flowing against respondent City of Norwalk, petitioners' third party action would be moot seeing that respondent third party City of Norwalk had on December 3, 1975 withdrawn

its cross-complaint against respondent Amercoat, and on March 3, 1976 had withdrawn its third party defendant's counterclaim against petitioners (Pfotzers). Hence the Superior Court--Harold H. Dean, Judge--ruled "...there was nothing to try" in the subject action and such ruling was intended to place the petitioners out of court without a trial on the merits and without costs, and damages as sought in petitioners' (Pfotzers') "Amended Answer and Counterclaim" against respondent Amercoat; and without full indemnification, installation costs, and damages in petitioners' (Pfotzers') third party action against respondent City of Norwalk.

13) On April 1, 1976, the Supreme Court of Connecticut, Harold H. Dean, Judge, denied petitioners', defendants' and third party plaintiffs' (Pfotzers') motion for reargument etc. as culminating

with the said court's decisions of March 16, 1976, "there is nothing to try".

14) On April 9, 1976 and April 13, 1976, petitioners, defendants and third party plaintiffs (Pfotzers) filed their appeal and "Assignment of Errors" as involving the Superior Court's decisions in Civil Action No. 14326 as were in their totality involved in the court's progressive decisions in the action.

15) On April 26, 1976 respondent (Amercoat) filed its motion to dismiss petitioners', defendants' and third party plaintiffs' (Pfotzers') appeal as filed April 9, and 13, 1976 supra.

16) On October 20, 1976, petitioners (Pfotzers), defendants and third party plaintiffs received the October 13, 1976 decision of the Supreme Court of Connecticut. Exhibit 1a - Appendix, annexed and incorporated indicating re-

spondent Amercoat's motion of dismissal was granted.

17) On November 3, 1976, petitioners' (Pfotzers') timely motion to reargue the Supreme Court's decision of October 13, 1976, was denied and entered in the Superior Court on November 10, 1976. (Exhibit 2a - Appendix)

18) On January 13, 1977 the Supreme Court of the United States granted petitioners' (Pfotzers') request for time extension to April 2, 1977 to docket their petition.

RELEVANT PERTINENT FACTS

19) On November 7, 1974, a "STIPULATION OF DISMISSAL" with prejudice was entered in the court records between respondent Amercoat Corporation, and Ameron Inc. (its successor by merger), and petitioners (Pfotzers) in the United States

District Court of Delaware, Civil Action No. 4768. Said stipulation was in accord with the terms of its predecessor stipulation of September 9, 1974 (Section 7 - pages 31 to 35 inclusive supra); as had been entered on the record in open court, in the Superior Court of Connecticut. Pursuantly, on December 3, 1975 the November 7, 1974 stipulation supra was breached by respondent Amercoat Corporation. (Copy of the November 7, 1974 stipulation is attached marked 3a).

20) On November 11, 1974, a "STIPULATION OF DISMISSAL" with prejudice was entered in the court records between respondent Amercoat Corporation, and Ameron, Inc. (its successor by merger) and petitioners (Pfotzers), in the United States District Court of Connecticut, Civil Action No. B-947. Said stipulation

was in accord with the terms of its predecessor stipulation of September 9, 1974 (Section 7 - pages 31 to 35 inclusive supra); as had been entered on the record in open court in the Superior Court of Connecticut. Pursuantly, on December 3, 1975 the November 11, 1974 stipulation supra was breached by respondent Amercoat. (Copy of the November 11, 1974 stipulation is attached marked 4a.)

21) On October 8, 1975, respondent City of Norwalk, third party defendant in the subject Civil Action No. 14326 in the Superior Court of Connecticut, and who had jointly participated in the September 9, 1974 stipulation before State Referee P. B. O'Sullivan (Section 7 pages 31 to 35), filed its memorandum entitled "MEMORANDUM IN SUPPORT OF MOTION TO STRIKE FROM THE JURY DOCKET". In this

latter memorandum, the City of Norwalk's Corporation Counsel, with extreme particularity, precisely set out the terms of the September 9, 1974 "Stipulation", and the specific pertinent facts involved. It was on the basis of that agreement supra, as was witnessed to by the City's Corporation Counsel's personal recitation in said memorandum supra, which induced these petitioners (Pfotzers) to subsequently participate in the two separate "STIPULATIONS OF DISMISSAL" (See attached Exhibits 3a and 4a). On December 3, 1975 (Section 9 - pages 36 to 39 inclusive), respondents Amercoat and City of Norwalk collusively breached the said "Stipulation" of September 9, 1974 as had fraudulently induced petitioners' participation. Respondent City of Norwalk's "MEMORANDUM IN SUPPORT OF MOTION

TO STRIKE FROM THE JURY DOCKET" supra is attached as Exhibit 5a.

REASONS FOR GRANTING THE WRIT

The straight forward reasons are several; mainly:

(1) Because the record in the case is so replete with ill-considered, unreasonable and illegal decisions, intentionally fashioned by the Superior Court of Connecticut to militate against these petitioners. And because these same defective decisions were affirmed en masse by the Supreme Court of Connecticut and such without the benefit of supporting opinions.

Because the decisions en masse seriously violated and deviated from the mandatory doctrine of the Constitution of the United States of America and laws enacted in pursuance thereof, and which

constitute the law of the land.

Because the initial defective decisions by the Superior Court, and as affirmed by the Supreme Court of Connecticut, were not made in furtherance of substantial justice, but in circumvention thereof. The decisions were flagrantly defective; and as a foreseeable consequence, did effectively deprive the petitioners (Pfotzers) of their involved constitutional rights and in the manner as partially set out in the several questions presented.

(2) Because the Superior Court and the Supreme Court of Connecticut progressively, and for undisclosed reasons, permitted, and condoned the fraudulent acts of the respondents' several counsels in critical matters which in the light of the inevitably progressive events, proved dispositive of the action against petitioners' interests.

(3) Because the several decisions of the Superior Court of Connecticut, and their progressive ratification by the Supreme Court of Connecticut are in affirmative conflict with this Court's relevant decisions. (See ARGUMENT)

(4) Because the several decisions of the Superior Court of Connecticut and their progressive affirmance by the Supreme Court of Connecticut are in conflict with relevant General Statutes of Connecticut, and of pertinent decisions of the Supreme Court of the United States. (See ARGUMENT)

(5) Because each of the issues presented hereinabove, involve substantial federal questions, and in their totality are of most substantial and compelling weight.

In summary, petitioners assert that all of the federal questions herein presented reasonably suggest, in consideration of the involved facts, that the application of this Court's function and power is justified and pleaded to judicially review, and potentially remedy, the stated violation of petitioners' basic constitutional rights.

ARGUMENT

POINT I

PETITIONERS' TIMELY JURY DEMAND ENTITLED THEM TO A JURY TRIAL ON THE ENTIRE ACTION, AND PARTICULARLY ON THEIR THIRD PARTY COMPLAINT--ISSUES OF WHICH ARE INTERTWINED WITH ISSUES IN COMPLAINT--BUT WHICH JURY TRIAL WAS SUBSEQUENTLY ILLEGALLY DENIED BY THE CONNECTICUT COURTS IN VIOLATION OF AMENDMENT VII OF THE U. S. CONSTITUTION.

Pursuantly, petitioners point out that their right to a jury trial in the subject action is protected by Amendment VII of the Constitution of the United States, and by the Connecticut State Constitution (Article 1, Section 19), which provides: "The right of trial by jury shall remain inviolate."

Relevantly, Section 52-215 of the Connecticut General Statutes ostensibly

particularized petitioners' (Pfotzers') right to trial by jury, and as including the entire action. Correlatively, Section 78A of the Connecticut Practice Book, (Superior Court Rules), provides for the re-opening, or the holding open of pleadings whenever a third party is cited into the action; and petitioners' timely jury demand (under General Statute, Section 52-215) as set out in their answer to third party defendant's, City of Norwalk's, pleadings entitled petitioners to a jury trial on the entire action when the issues are intertwined throughout the action.

Further, the pleadings in the original complaint still being open, seeing co-defendant Transamerica Insurance Company (the petitioners' bonding company whose defense was being supplied and paid for by petitioners) not having yet answer-

ed the primary complaint when petitioners' jury demand was filed and served, and respondent plaintiff, Amercoat, not having yet answered respondent third party defendant's (City of Norwalk) cross-complaint against it; or the pleadings were correlatively re-opened by virtue of Sec. 78A of the Connecticut Practice Book, petitioners (Pfotzers), defendants and third party plaintiffs, should not have been foreclosed from a full jury trial when the right thereto was still open to the other parties to the action; or else petitioners are deprived of their right to a jury trial protected by the Constitution of the United States and by the State of Connecticut Constitution supra, Leahey v. Heasley (1940) 127 Conn. 332, 334; Noren v. Wood, 72 Conn. 96, 43 AH. 649.

Nevertheless, the record shows Section 6)[2], pages 30 and 31 supra that the Superior Court denied petitioners their right to a jury trial. The record further shows that petitioners duly asserted that said denial of jury trial deprived them of their "constitutional right to a jury trial against: (1) the plaintiff, and/or (2) the third party defendants".

On January 15, 1974 the Supreme Court of Connecticut, after a hearing on petitioners' (Pfotzers') appeal, denied petitioners a right to jury trial as defendants in the action, but granted them a right to trial by jury in petitioners' third party action.

- On March 16, 1976, the Superior

2 Section and page designations refer to pertinent references contained in "Statement of the Case", pages 11 to 28 inclusive as necessitated by the absence of the repetitively requested court record.

Court of Connecticut--Hon. Harold H. Dean, Judge, Sec. 11)[2] p. 40--denied petitioners not only the right to jury trial in the primary action but also the right to trial by jury in petitioners' third party action as had been granted them by the Supreme Court of Connecticut on January 15, 1974 supra. Thus the court denied petitioners the protection of their constitutional right to jury trial, and correlatively to due process as guaranteed by Amendment XIV of the Constitution of the United States (12 Am Jur 258 et seq), and the foregoing despite the fact that Sec. 52--215 of the Connecticut General Statutes as encom-

- passing Sec. 78A supra, as relates to

2 Section and page designations refer to pertinent references contained in "Statement of the Case", pp. 18 to 50 inclusive as necessitated by the absence of the repetitively requested court record.

third party pleadings, reinforces petitioners' right to jury trial under State Constitution, statutes and rules supra. When the Supreme Court dismissed petitioners' appeal without a hearing, Exhibits 1a and 2a, said Supreme Court of Connecticut ratified its lower court's decision supra and collaterally violated petitioners' right to jury trial as protected by Amendment VII of the Constitution of the United States of America.

POINT II

AFTER PETITIONERS (PFOTZERS) HAD CHANGED THEIR POSITION BY WITHDRAWING THEIR TWO DERIVATIVE ACTIONS FROM THE UNITED STATES DISTRICT COURTS OF CONNECTICUT AND DELAWARE, IN RELIANCE ON THE TERMS OF THE PARTIES' SEPTEMBER 9, 1974 STIPULATION, THE RESPONDENTS HEREIN COLLUSIVELY BREACHED THE SAID STIPULATION AS HAD BEEN PROCURED BY RESPONDENTS' FRAUD IN THE INDUCEMENT; AND RESPONDENTS' ACTS WERE SUBSEQUENTLY COUNTENANCED BY THE CONNECTICUT STATE COURTS IN VIOLATION OF ARTICLE IV - SECTION 1 OF THE U. S. CONSTITUTION.

The record shows that petitioners (Pfotzers), in accord with the terms of the stipulation of September 9, 1974, fulfilled all the promises, terms and conditions as were imposed on them by the said stipulation, including their withdrawal of petitioners' two derivative actions in the United States District Courts for the States of Connecticut and Delaware, Exhibits 3a and 4a.

Pertinently, the trial of petitioners' (Pfotzers) Civil Action No. 4768 in the United States District Court for the State of Delaware, had been therebefore established for mid-February, 1975.

As a consequence of the respondents' breach of the stipulation supra Section 7) ~~pp. 31, 32, 33, 34, 35 supra~~, petitioners (Pfotzers) were thereby deprived of a timely jury trial in the United States District Court for the State of Delaware; and in lieu thereof were thereafter greatly damaged by the expanded scope of the delaying procedures as thereafter progressively were inflicted upon petitioners in the subject action. The Court is respectfully referred to the Superior Court's Docket Record (if and when supplied)[2] following September 9, 1974, for confirmation of this statement. Said

[2] ibid.

damage to these movants was wilfully and wantonly inflicted by the respondents upon the petitioners, and said breach of the September 9, 1974 stipulation did correlatively serve as a channel for the prolongation of respondents' reckless litigation procedures, rather than as a means to an expeditious and economical resolution of the involved issues. Milnick v. Binenstick, 179 A 78.

Pursuantly, it is to be particularly noted that respondent third party defendant, the City of Norwalk, despite its agreement to the stipulation of September 9, 1974, and its reiteration of that agreement Exhibit 5a, breached that agreement. Said agreement had fraudulently induced petitioners (Pfotzers) to change their position in the two Federal Courts by entering into separate stipulations

dismissing the said actions with prejudice. The stipulation of September 9, 1974 in Civil Action No. 14326 in the state court had provided for the consolidation and litigation of the two derivative federal actions with the subject state action, through the incorporation of petitioners' previously denied "Amended Answer and Counterclaim" of June 18, 1973 in the subject state pleadings. Accordingly, respondent City of Norwalk's attempted collusive withdrawal of its cross-complaint against respondent Amercoat, and respondent City of Norwalk's oral motion of March 2, 1976, constituted its quid pro quo for respondent Amercoat's attempted withdrawal of its complaint against the petitioners.

The foregoing: so as to at the one

time fraudulently deprive petitioners of due process, their day in Court, against respondent Amercoat in the Federal Courts; and as against the said respondent Amercoat and respondent third party defendant, the City of Norwalk, in the subject action. By the City of Norwalk's obvious collusive action with respondent Amercoat Corporation, it sought to negate and deprive petitioners of the benefit of their "Amended Answer and Counterclaim" of June 18, 1973 against respondent Amercoat --the very essence of petitioners' case in the involved subject action, and as encompassing the principal issues in Civil Action No. 14326. Clearly, the City of Norwalk should have been estopped by the Superior Court of Connecticut from pursuing its motion for Summary Judgment by its acknowledged agreement as is set

out in Exhibit 5a.

Petitioners assert that despite the fact that they had timely and repetitively submitted copies of Exhibits 3a and 4a as attachments to papers before the Superior Court of Connecticut; and had stressed the fact that the respondents had by fraud induced petitioners' participation in the said stipulations of dismissal, the Superior Court of Connecticut refused to recognize the validity of the pertinent orders (Judicial Proceedings) of the United States District Courts of Delaware and Connecticut respectively, and ruled that the said two stipulations were without force and effect. Subsequently, the Supreme Court of Connecticut, by dismissing petitioners' subsequent appeal without a hearing on petitioners' "Assignment of Errors", Exhibits 1a and 2a, rati-

fied the lower court's rulings supra.

Petitioners assert that as a consequence of the Connecticut courts' denial of the validity[2] of the involved Federal Court orders, Exhibits 1a and 2a, the petitioners were deprived of the protection of Article IV - Section 1 of the Constitution of the United States as involving the essential doctrine of "Full Faith and Credit...and Judicial Proceedings of every other state" and such to petitioners' great damage. The latter in that--but for the said two dismissals with prejudice, in the United States District Courts supra--these actions would have <u>been duly litigated</u>.

[2] ibid.

POINT III

PETITIONERS ASSERT THE COURT RECORD[2] SHOWS RESPONDENT AMERCOAT'S ATTORNEY COMMITTED FRAUD ON THE CONNECTICUT STATE COURTS AND ON PETITIONERS (PFOTZERS) ALIKE; AND SAID ATTORNEY'S FRAUD RESULTED IN THE OBSTRUCTION OF JUSTICE, IN THAT PETITIONERS WERE THEREBY ULTIMATELY DENIED A HEARING ON THE MERITS OF THEIR INVOLVED ACTIONS IN VIOLATION OF AMENDMENT XIV - SECTION 1 OF THE UNITED STATES CONSTITUTION.

Because of its relevancy to the matters hereinafter involved, petitioners respectfully suggest that at the outset, the Court scrutinize the factual record set out in "Statement of the Case" Section 5) pp. 25 to 30 inclusive supra.

Petitioners assert that on June 18, 1973, they filed and served their motion and "Amended Answer and Counterclaim" in the subject action in accord with

[2] ibid.

Section 52-130 of the General Statutes of Connecticut, and Sec. 132 of the Connecticut Practice Book captioned: "Amendment by Consent, Order of Court, or Failure to Object." Said Statute and Court Rule prescribe the procedures required to be followed in the matter of adding an amendment to the pleadings; and specifically provides that should an adverse party not file a written objection to a duly proposed amendment to a pleading, or any part thereof, within ten days from the date of filing a motion and proposed amendment, such proposed amendment will thereafter automatically become a part of the pleadings.

The record shows that respondent Amercoat was served petitioners' motion and proposed "Amended Answer and Counterclaim" supra on June 19, 1973, Exhibit 7

attached. The latter certified mail receipt evidences that respondent Amercoat had until June 28, 1973 to file an objection to the proposed amendment. Respondent Amercoat not having timely filed an objection, petitioners duly filed their "Amended Answer and Counterclaim" supra as a separate pleading in accord with the applicable requirement of said Sec. 132 supra.

However, on or about July 16, 1973, respondent Amercoat filed an opposing paper as intended to seek disallowance of petitioners' duly filed "Amended Answer and Counterclaim". Pursuantly, on July 20, 1973, at a "Short Calendar" hearing, petitioners informed the court that it lacked subject matter jurisdiction over the amendment, inasmuch as respondent Amercoat had failed to supply its objection in writing within the pre-

scribed ten-day period as set out in Sec. 132 of the Connecticut Practice Book.

Whereupon respondent Amercoat's attorney falsely informed the Superior Court that he had not received petitioners' said "Amended Answer and Counterclaim" until on or about July 16, 1973. Thereupon petitioners informed the court that Amercoat's attorney's statement was untrue, and that his receipt of certified mail, was in hand, and was dated June 19, 1973. The court then accepted the several papers submitted but reserved its decision. Three days later the court mailed its decision, stating that petitioners' "MOTION TO AMEND WAS DENIED". Said decision was related to petitioners' motion whereas the "Amended Answer and Counterclaim" had been filed with the court on July 9, 1973. The court's de-

cision was unaccompanied by any supporting opinion.

The "Amended Answer and Counterclaim" were critical to the case and their disallowance was in effect potentially dispositive of petitioners' case as pertinent to respondent Amercoat's complaint and petitioners' original answer thereto. Accordingly, petitioners appealed the Superior Court's decision to the Supreme Court of Connecticut as being one which in its effect not only constituted a final judgment, for appeal purposes, Springfield-DeWitt Gardens, Inc. v. Wood 143 Conn. 708-710, but it also represented a judgment which had been procured by the respondent Amercoat's attorney's fraud on the court and on the petitioners.

Prior to the hearing of petitioners' appeal in the Supreme Court of Connecti-

cut, petitioners filed their brief, and also their "AFFIDAVIT IN SUPPORT OF BRIEF...IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS APPEAL" both dated March 21, 1974. Included in "POINT V" of petitioners' brief supra was their argument captioned: "DENYING DEFENDANTS ACCESS TO THE LOWER COURT TO LITIGATE THEIR COUNTERCLAIM AGAINST THE PLAINTIFF IS, IN EFFECT, TO DENY DEFENDANTS THEIR CONSTITUTIONALLY PROTECTED RIGHTS TO ACCESS TO THE COURTS". Similarily the same point was made in paragraph (8) of petitioners' affidavit of March 21, 1974 and subsequently developed at length in their oral argument of April 2, 1974 before the Supreme Court.

Further, in petitioners' affidavit supra, petitioners stated "Receipt of copies of the foregoing papers as were

served upon the plaintiff was acknowledged by plaintiff as of June 19, 1973--Certified Mail No. 253134."

On April 2, 1974, at the Supreme Court's hearing of petitioners' appeal, respondent Amercoat's attorney again repeated his false representation that he had not received petitioners' "MOTION TO AMEND" as filed on June 18, 1973, with its attached "Amended Answer and Counterclaim" until July 16, 1973, whereas the certified mail receipt which petitioner then offered to the court for examination showed that it had been received on June 19, 1973 (Exhibit 7a). However, the Supreme Court subsequently dismissed petitioners' appeal without an opinion, and despite the fact that petitioners had in their brief, and in their oral argument, pointed out to the Supreme

Court that a denial of their appeal would constitute a violation of their constitutional right to access to the courts--due process.

As a consequence of respondent Amercoat's affirmative false representations as to the actual date of its receipt of the "Amended Answer and Counterclaim", the petitioners were thereafter compelled to initiate parallel proceedings in two United States District Courts at great additional collateral time and expense. The dockets of those two cases, Civil Action 4768 in the U. S. District Court of Delaware and B-947 in the U. S. District Court of Connecticut, are replete with costly proceedings forced upon these petitioners.

Petitioners submit that respondent Amercoat's affirmative fraud supra was

not only against the petitioners, but more basically against the involved Connecticut Courts supra. It is presently not known why the Connecticut Courts supra ostensibly chose to ignore the obvious fraud perpetrated on the courts as was repetitively brought to their attention by the petitioners. Pursuant to the foregoing fraud, courts of coordinate jurisdiction have universally held:

> (p. 1073) "An attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and, when he departs from that standard, he perpetrates a 'fraud upon the court' within savings clause of rule governing relief from judgment or order. Fed. Rules Civ. Proc. Rule 70(b) (1,3), 28 U.S.C.A., Kupferman v. Consolidated Research & Mfg. Corp., 459 F 2d 1073 (1972 - 2d Cir.)"
>
> (p 518) As quoting from the Supreme Court in 328 US 530: "The inherent power of a federal court

> to investigate whether a judgment was obtained by fraud, is beyond question. Hazel-Atlas Co. v. Hartford-Empire Co., 322 US 238, 64 S. Ct. 997, 88 L. Ed. 1250. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs. Sprague v. Taconic National Bank, 307 US 161, 167, 59 S. Ct. 777, 780, 83 L. Ed. 1184." Root Refining Co., v. Universal Oil Products Co., 169 F 2d 514 (1948-CA-3d Cir.)

On March 16, 1976, the Superior

Court ruled, Sec. 11) pp. 40 and 41 supra, that because of the absence of petitioners' "Amended Answer and Counterclaim" in the pleadings, it was permitting the respondent Amercoat to withdraw its complaint against the petitioners, and thereby collapsing the entire action, in that "there is nothing for this court to try".

In consideration of the totality of the foregoing, petitioners submit that as a consequence of the respondent Amercoat's attorney's repetitive fraud, and as utilized to defeat these petitioners' action in the Superior Court....that said fraud constituted an obstruction of justice, in that petitioners were thereby ultimately denied a hearing on the merits of their involved actions. It is clear that the petitioners have been denied "due process" as protected by Amend-

ment XIV - Section 1 of the Constitution of the United States of America.

POINT IV

PETITIONERS ASSERT RESPONDENTS AMERCOAT, AND CITY OF NORWALK FRAUDULENTLY INDUCED PETITIONERS TO ENTER INTO THE STIPULATIONS OF SEPTEMBER 9, 1974, NOVEMBER 9, 1974, AND NOVEMBER 11, 1974 AND WHICH THEY IN TURN COLLUSIVELY BREACHED; AND COLLUSIVELY UTILIZED TO WITHDRAW THEIR ACTIONS ONE AGAINST THE OTHER, AND WHEREBY PETITIONERS WERE DENIED DUE PROCESS. PERTINENTLY, FEDERAL AND STATE COURTS HAVE BEEN VIRTUALLY UNANIMOUS IN VACATING PRIOR JUDGMENTS AS PROCURED BY TRICK, ARTIFICE OR OTHER FRAUDULENT CONDUCT.

Because of its relevancy to the matters hereinafter involved, petitioners respectfully suggest that at the outset, the Court refer to the factual record as set out in petitioners' "Statement of the Case", Section 7) pp. 31 to

35 inclusive supra; Section 9) pp. 36 to 39 inclusive supra; Section 10) pp. 39 and 40 supra; Section 12) pp. 41 to 44 inclusive supra; Section 19) pp. 46 and 47 supra; Section 20) pp. 47 and 48 supra; and Section 21) pp. 48 to 50 inclusive supra. Pertinently all of the foregoing references are inextricably intertwined in petitioners' hereinafter assertions of respondents' fraudulent conduct.

On September 9, 1974, following the restricted trial of respondent Amercoat's primary action by the State Referee P. B. O'Sullivan, and which was to be followed at a later date by a trial to the jury of petitioners' third-party action; the respondents and petitioners entered into a voluntary stipulation, on the record in open court, and with the State Referee

participating as a collateral party. The said agreement as then entered into was subsequently clearly and succinctly set out by respondent City of Norwalk's Corporation Counsel in his "MEMORANDUM IN SUPPORT OF MOTION TO STRIKE FROM THE JURY DOCKET", as dated October 8, 1975, (Exhibit 5a attached). The City's Corporation Counsel in essence stated that the stipulation recorded that the parties agreed, and the State Referee agreed, that State Referee P. B. O'Sullivan would hear and decide the entire case. The latter agreement was essential inasmuch as all parties had previously agreed: that petitioners' "Amended Answer and Counterclaim" as originally filed on June 18, 1973; and as previously disallowed by the Superior Court on July 20, 1973 (see POINT III supra), would be reinstated in the sub-

ject action; that petitioners would withdraw their two pending derivative actions in the United States District Courts of Connecticut and Delaware; and said pending actions would thereafter be consolidated with the subject Civil Action No. 14326 by the reinstatement of petitioners' "Amended Answer and Counterclaim" as originally filed June 18, 1973. The foregoing inasmuch as each of the two federal actions paralleled the substance of the said June 18, 1973 "Amended Answer and Counterclaim". Also by the stipulation, agreement, the further trial of the primary action, and of the third-party action by the State Referee was to be continued on November 18, 1973. In addition it was agreed that the petitioners would forego their right to jury trial of their third-party action. The

latter so that the State Referee might then hear the entire action, and without a jury.

The stipulation of September 9, 1974 supra, as made and recorded in open court, under Connecticut law, constituted a contract between the parties involved. Subsequently, however, respondent Amercoat, Section 7) pp. 31 to 35 inclusive, unilaterally breached the said stipulation (contract), which had become the law of the case; namely:

> "The court with jurisdiction of the subject matter of an action has inherent power to enter judgment in that action by stipulation. Such a judgment is not a judicial determination of a litigated right but the embodiment of a contract in a form which places the matters covered by it beyond further controversy. If the judgment conforms to the stipulation it cannot be altered or set aside unless the stipulation was obtained by fraud, accident or mistake." Byron v. Reynolds, 143 Conn 456.

On November 7, 1974, a "STIPULATION OF DISMISSAL" with prejudice was entered in the court records of the United States District Court of Delaware, Civil Action No. 4768, Exhibit 3a, between respondent Amercoat Corporation and Ameron, Inc. (its successor by merger), and petitioners (Pfotzers). Said stipulation was entered in accord with the terms of its predecessor stipulation of September 9, 1974 Section 7) pp. 31 to 35 inclusive supra, as had been duly entered on the record in open court, with State Referee P. B. O'Sullivan of the Superior Court of Connecticut participating. However, on December 3, 1975, the November 7, 1974 stipulation supra, as predicated on the September 9, 1974 stipulation as entered in the Connecticut Court, was breached by respondent Amercoat Corporation. The de-

tails of the foregoing are set out in Section 19) pp. 46 and 47 supra. Pertinently, the petitioners were induced by respondent Amercoat's fraudulent representations to enter into the stipulation of November 7, 1974. Refer to POINT II - pp. 60 to 66 inclusive supra.

On November 11, 1974, a similar "Stipulation of Dismissal" with prejudice was entered in the court records of the United States District Court of Connecticut, Civil Action No. B-947, Exhibit 4a between respondent Amercoat Corporation and Ameron, Inc. (its successor by merger) and petitioners (Pfotzers). Said stipulation was in accord with its predecessor stipulation of September 9, 1974, Section 7) pp. 31 to 35 inclusive supra; as had been entered on the record in open court with State Referee P. B. O'Sullivan

of the Superior Court of Connecticut participating. Pursuantly, on December 3, 1975, the November 11, 1974 stipulation supra was unilaterally breached by respondent Amercoat. The details of the foregoing are set out under Section 20) pp. 47 and 48 supra. Pertinently, the petitioners were induced by respondent Amercoat's fraudulent representations to enter into the stipulation of November 11, 1974. Refer to POINT II - pp. 60 to 66 inclusive supra.

At this point, and in chronological development, and for brevity only - petitioners include by reference the entire Section 9) pp. 36 to 39 inclusive supra verbatim. The latter because of its immediate relevancy and materiality - and such as commencing with the words "Subsequently on December 3, 1975..."

and terminating with the words "...over petitioners' objection and exception".

Pursuantly, petitioners assert that respondents Amercoat and City of Norwalk, as following their planned fraud in the inducement of the September 9, 1974 stipulation supra; continued their course of commingled trickery, artifice and other fraudulent conduct without a break - "once the die was cast". The latter culminating with respondents' attack on the validity of the September 9, 1974 stipulation in Civil Action No. 14326.

Petitioners assert that on March 16, 1976, as a direct consequence of respondent Amercoat's counsel's deliberate fraud on the court, Section 5 supra; and correlatively of respondents' counsels' fraud in the inducement and breach of the stipulation of September 9, 1974,

Section 7) supra; and as coupled with respondents' collective fraud as was implemented on December 3, 1975, Section 9) supra; petitioners' "Amended Complaint and Counterclaim" of June 18, 1973 was arbitrarily and erroneously ruled by the court as not being a part of the pleadings in Civil Action No. 14326.

Pursuant to the immediate foregoing: the record shows that the respondents had never filed their notices of motion and motion as required to establish a "Short Calendar" hearing on their respective intended withdrawals. Nor does the record show that the court had at any time issued a valid written order evidencing that it had duly heard adversary argument. The latter as responsive to proper motions, as duly noticed, and placed on a required "Short Calendar" for hearing of potential adversary opposition. Such pro-

cedures were required, incident to respondent Amercoat's and respondent City of Norwalk's attempted correlated and collusive withdrawals of December 3, 1975 as essential to secure a valid order "as by leave of court for cause shown" as in accord with Section 52-80 of the Connecticut General Statutes as interpreted by the Connecticut Supreme Court:

> "Where a case is withdrawn after the commencement of a hearing by leave of court for cause shown: the order of the court granting permission to withdraw is essential to prevent further action in the case, and that order, like any other, can of course be vacated or modified during the term at which it was made..." Lucas v. St. Patrick's Roman Catholic Church Corp. 123 Conn. 168, 169, Bristol v. Bristol Water Co. 85 Conn. 673.

The court, however, on March 16, 1976, sought to avoid the essential procedures supra, and as including a hearing: "as by leave of the court for cause shown" by contrariwise issuing its oral ruling, to

have the retroactive effect of sanctioning and permitting respondent Amercoat to withdraw its complaint against petitioners; and collaterally, sanctioning and permitting respondent third party defendant City of Norwalk to withdraw its cross-complaint in the third party action against respondent Amercoat Corporation.

Thereafter, Judge Dean arbitrarily and erroneously ruled that: inasmuch as Amercoat had withdrawn its action against petitioners (Pfotzers); and seeing that petitioners had no "Amended Answer and Counterclaim" in the action against respondent Amercoat; that as a consequence, there could be no potential indemnity flowing against respondent City of Norwalk to the petitioners; and that as a consequence petitioners' third party action would be moot, seeing that third party defendant, City of Norwalk had on December 3, 1975,

withdrawn its cross-complaint against respondent Amercoat, and subsequently on March 3, 1976, had belatedly withdrawn its third party defendant's counterclaim against petitioners (Pfotzers) over petitioners' protests and exceptions.

Whereupon, the Superior Court--Harold H. Dean, Judge--ruled "...there was nothing to try" in the subject action and such ruling was intended to place the petitioners out of court without a trial on the merits, and without costs, and damages as sought in petitioners' (Pfotzers') "Amended Answer and Counterclaim" against respondent Amercoat; and without full indemnification, without attorneys' fees etc. (see footnote 1, pages 36 and 37 supra), installation costs, and damages in petitioners' (Pfotzers') third party action against respondent City of Norwalk.

Pursuant to the immediate foregoing,

it is to be noted that respondent City of Norwalk had not filed the procedurally required notice of motion, and motion for either the December 3, 1975 nor the March 3, 1976 withdrawals, so as to permit adversary "Short Calendar" hearings. Nor had the court issued its responsive orders in writing, as following required hearings, under Section 52-80 of the Connecticut General Statutes, permitting either of the two withdrawals, as essential to secure a valid order, "as by leave of the court for cause shown"; and as interpreted by the Connecticut Supreme Court in Lucas v. St. Patrick's Roman Catholic Church Corp. 123 Conn. 168, 169, Bristol v. Bristol Water Co. 85 Conn. 673.

Accordingly, the said withdrawals were invalid but nevertheless had been

permitted by the court over petitioners' timely protests and exceptions.

Petitioners assert that the planned continuity of the aforesaid total fraud by the respondents was contrived prior to the entry of the "Stipulations of Dismissals", with prejudice, in the United States District Courts of Delaware and Connecticut respectively (see Section 19) pp. 46 and 47 and Section 20) pp. 47 and 48 supra). Said total fraud was formulated and carried out with the ultimate intent to obstruct justice, by depriving these petitioners of a hearing on the merits of their pending claims. Apropos of the foregoing, courts of coordinate jurisdiction etc. have ruled under analogous situations that:

> (p. 611) "6. Within rule pertaining to relief from judgment, fraud is "extrinsic" when a party is prevented from

fairly presenting his claim, his defense or his evidence by reason of a trick, artifice or other fraudulent conduct; Fed. Rules Civ. Proc. Rule 60(b), (3,6), 28 U.S.C.A." Armour & Co. v. Nard 56 F.R.D. 610 (1972 - U.S.D.C.)

(p. 95) "Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that on motion and upon such terms as are just, the court may relieve a party from a final judgment for fraud, misrepresentatiom or other misconduct of an adverse party." Hadden v. Ramsey Products et al., 196 F 2d 92 (1952 CA 2d Cir.)

(p. 435) "3. Orders dismissing actions with prejudice would be vacated after defendant refused to carry out terms of settlement agreement which was basis of dismissal of actions within district as well as other civil actions, actions within district would be in status quo, existing immediately following reading of settlement agreement into record, nonresident defendant would be required to return removed property which was in dispute and which was basis of jurisdiction and Federal District Court could then proceed to determine whether nonresident defendant in agreeing to settlement plan had submitted

to jurisdiction over her person." 28 U.S.C.A. § 1655., Kelly v. Greer, 334 F 2d 434 (1964 CA 3d Cir.)

(p. 157) "In general, relief from judgments has been given under subsection (6) in cases where the judgment was obtained by the improper conduct of the party in whose favor it was rendered...under circumstances not covered by subsections (1) to (5) which, in the opinion of the court, required the application of subsection (6) in order that the case be tried on its merits and justice be done." United States of America v. Cato Brothers Inc. et al., 273 F 2d 153 (1959 4th Cir.)

(p. 518) As quoting from the Supreme Court in 328 US page 580: "The inherent power of a Federal court to investigate whether a judgment was obtained by fraud, is beyond question. Hazel-Atlas Co. v. Hartford-Empire Co., 322 US 238, 64 S. Ct. 997, 88 L. Ed. 1250. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be

adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs. Sprague v. Taconic National Bank, 307 US 161, 167,59 S. Ct. 777, 780, 83 L. Ed. 1184", Root Refining Co. v. Universal Oil Products Co., 169 F 2d 514 (1948 CA 3d Cir.)

Apropos of the foregoing, petitioners respectfully suggest that the total evidence they have set out herein is sufficient to justify this court decreeing that there was such a commingling of planned fraud, trick or artifice or other fraudulent conduct on the part of respondents' counsel in both cases, that such would reasonably support a decision to

remand the case to the court below for a more definite determination as was mandated by federal courts under generally analogous situations. Hazel-Atlas Glass Co., v. Hartford-Empire Co. 332 U.S. 238-271 (1943 Oct. Term), Marine Ins. Co. v. Hodgson, 7 Cranch (US) 322, 3 L. Ed. 362, Root Refining Co. v. Universal Oil Products Co. 169 F 2d 514 (1948 CA 3d Cir.), Sprague v. Taconic National Bank, 307 U.S. 161, 167, Hadden v. Ramsey Products et al, 196 F 2d 92 (1952 CA 2d Cir.), Charles Pfizer & Co. v. Davis-Edwards Pharmacal Corp. 385 F 2d 533 (1967 CA 2d Cir.), United States v. Cato Bros. et al 273 F 2d 153 (1959 4th CCA).

Pursuant to the totality of the foregoing, petitioners respectfully submit that as a consequence of the respondents' involved frauds; and as were collectively utilized by them to wrongfully

defeat these petitioners' actions in the Superior Court of Connecticut, and in the United States District Courts of Connecticut and Delaware supra; that said frauds constitute a deliberate attempt at obstruction of justice. The latter in that these petitioners were thereby wrongfully denied "due process" as protected by Amendment XIV - Section 1 of the Constitution of the United States; and the foregoing was the inevitable product of the Superior Court and Supreme Court of Connecticut having wrongfully recommended, permitted, and condoned the respondents' collusive withdrawals of their respective complaints one against the other, and all to petitioners' great damage.

POINT V.

THE COURT RECORD SHOWS THE SUPERIOR COURT URGED THE RESPONDENTS EX PARTE TO WITHDRAW THEIR ACTIONS ONE AGAINST THE OTHER, WHICH THEY DID; AND SUBSEQUENTLY RULED PETITIONERS' "AMENDED ANSWER AND COUNTERCLAIM" WERE NOT IN THE ACTION THUS CORRELATIVELY COLLAPSING THE ENTIRE CASE. THE COURT THEN RULED "THEREFORE THERE IS NOTHING FOR THIS COURT TO TRY". HENCE PETITIONERS WERE WRONGFULLY DEPRIVED OF DUE PROCESS IN VIOLATION OF AMENDMENT XIV OF THE U. S. CONSTITUTION.

Petitioners assert that on December 3, 1975, more than six years after respondent Amercoat Corporation had commenced its primary litigation of Civil Action No. 14326 in the Superior Court of Connecticut, and after petitioners (Pfotzers), defendants therein, had been compelled to answer and make in excess of three hundred and eighty separate proceedings and responses, in four different

courts, and as following two prior hearings restricted to the merits of respondent Amercoat's primary action herein, the respondent Amercoat sought to withdraw its action against the petitioners (Pfotzers).[1]

Specifically, on December 3, 1975, respondent Amercoat, without any prior notification to these petitioners, at what had been scheduled to be a pre-trial

1 (Also appears pp. 36 and 37) The respondent (plaintiff-Amercoat) and respondent (third party defendant City of Norwalk) collusively sought to withdraw their respective complaint and cross-complaint in the state action, in their attempt to vitiate both the primary action and third party action. The latter after having therebefore been informed by petitioners, defendants and third party plaintiffs (Pfotzers) that their cost to defend the entire action had to December 3, 1975, cost petitioners (Pfotzers) in excess of $55,000.00 (as the aforesaid respondent Amercoat and respondent City of Norwalk, both well knew, and for which $55,000.00 the petitioners (Pfotzers) were seeking indemnity and correlated damages from both said two parties.) See Section 3) supra.

conference pertinent to the trial of the primary action to the court, and of the third party action to the jury, sought to withdraw its action against petitioners (Pfotzers) in violation of Section 52-80 of the Connecticut General Statutes. The respondent Amercoat, by obvious prearrangement, and as acting collusively with respondent City of Norwalk, third party defendant[2], attempted to effect the following procedures as set out in the transcript of the December 3, 1975 proceedings:

(a) Respondent Amercoat, without notice to petitioners, sought to restrictively withdraw its complaint against Edmond Pfotzer and Transamerica Insurance Company but otherwise leaving E. John Pfotzer in that action. The

2 ibid.

transcript record shows that respondent Amercoat did not in fact withdraw its action against herein petitioner E. John Pfotzer, and as over E. John Pfotzer's timely objection and exception to the entire proceedings. The court, Harold H. Dean, on the occasion informed petitioner E. John Pfotzer, that he had no standing to oppose the attempted withdrawal.

(b) On December 3, 1975, the respondent City of Norwalk, third party defendant, likewise without notice to petitioners (Pfotzers), defendants and third party plaintiffs, and as acting collusively with respondent Amercoat, sought to withdraw its third party cross-complaint against the respondent Amercoat; and yet leaving standing its third party defendants' counterclaim against the petitioners (Pfotzers), defendants

and third party plaintiffs in the third party action. The foregoing attempt at withdrawal was also made over petitioners' objection and exception.

Pursuant to the immediate foregoing, on March 3, 1976, the day following the scheduled opening date for the trial of the action, respondent Amercoat's attorney, H. M. Lessin, Esq., in a brief colloquy with the court, commencing with line 10, page 103 of the transcript, said:

"MR. LESSIN: Let me get to this, Your Honor. There was third party action that's been withdrawn. Our action has been withdrawn.

THE COURT: Right.

MR. LESSIN: That was at the recommendation of the court, and we accepted that."

Petitioners were totally unprepared

for this spontaneous statement by Mr. Lessin to the effect that the withdrawals of December 3, 1975 as have been set out supra had been pre-arranged and urged ex parte on the respondents by the court as in obvious contravention of Section 52-80 of the Connecticut General Statutes. The foregoing all without the knowledge of these petitioners, whose interests were correlatively most vitally involved.

Petitioners assert that once the respondents had been urged by the court, ex parte, to mutually withdraw their respective actions one against the other, and it was then mutually understood, that in the event the court should subsequently rule that petitioners' "Amended Answer and Counterclaim", filed as of July 9, 1973, and reinstated by the stipulation of September 9, 1974, would not be admitted as a pleading in the action--it was a foregone conclusion that the petitioners' case against both respondents would thereby collapse; and that concomitantly respondent City of Norwalk would escape indemnifying the petitioners for all damages and costs stemming from the action; and likewise respondent Amercoat would escape all its liability inherent in the action. The foregoing with the result that the petitioners by the implementation of the plan as urged by the court, would have thereby been deprived of "due process"; that is, a hearing on the merits.

Petitioners, having been severely taken back by Attorney Lessin's spontaneous exculpatory statement supra, to the effect that the said collusive withdrawals had been urged on the respondents by

the court, without petitioners' awareness recognized the matter should be brought to the court's attention. Accordingly petitioners, desiring to bring the matter into the open, engaged in the following colloquy with the court, as commencing with line 7, page 118 of the transcript of March 3, 1976; namely:

"MR. PFOTZER: ....A few moments ago Mr. Lessin said that he accepted, or went along with the withdrawal of that action on the recommendation of the court; that the action was withdrawn.

I do not know whether he intended to say that it was at your recommendation that they engaged in that settling action.

I believe his words were, at the recommendation of the court. He agreed to settle their action, make their peace

with the City.

MR. LESSIN: Just want to interrupt at this point, Your Honor. Whatever right we had to withdraw that action, whatever right the City of Norwalk had to withdraw its complaint of the third party complaint against us, the City of Norwalk, nevertheless, and Transamerica (sic) counsel, Mr. Maher, the City of Norwalk nevertheless recognized it was in that third party action. It was not relieved of it. All it did was withdraw the complaint, its cross-complaint against us. And the withdrawal, where it joined us.

THE COURT: The court is interested in disposing of these matters, and if it can dispose of a matter without a trial it would intend to do so....."

Pertinently, petitioners submit

that even assuming the court's only intention was a desire to dispose of the case ex parte, without a trial supra, the court had no right to project itself into the situation ex parte and to urge the respondents ex parte and suggest related enabling strategy. That is the court, concurrently was aware that to avoid a trial, it would subsequently have to rule against the admittance of petitioners' "Amended Answer and Counterclaim". The latter to accomplish the court's expressed intent: "...if it can dispose of a matter without a trial, it would intend to do so".

Pursuantly, the latter intention was to be accomplished regardless if such ex parte procedure were to culminate in the wrongful destruction of petitioners' basic rights in the subject action. Such

ex parte, planned strategy did progressively develop, and additively placed the burden of six and one half years of costly and burdensome litigation, including two previous trials, as had been restricted to respondent Amercoat's primary action, on the petitioners, and as over petitioners' timely objections and exceptions (See footnote[1], pages 36 and 37 supra).

Petitioners assert that the transcript of the March 2, 3, 4 and 16, 1976 proceedings clearly indicates that the court's efforts and progressive rulings were predominately and purposefully directioned to prevent petitioners' case from coming to trial. Further, the April 1, 1976 transcript of the petitioners' motion for reargument of the court's prior arbitrary and erroneous decisions of March 2, 3, 4 and 16, 1976 as predi-

cated on petitioners' comprehensive memorandum in support of its motion, and the court's summary denial of petitioners' motion represents a further indication of the court's intent to avoid giving petitioners a trial on the merits of their case.

As correlatively involved is the fact that when the petitioners sought to file their appeal covering a series of arbitrary and wrongful rulings etc. in the Supreme Court of Connecticut, the latter court wrongfully dismissed petitioners' appeal out-of-hand, without an opinion, and as in tacit but effective support of all prior proceedings of the Superior Court of Connecticut, and without any consideration of the merits of petitioners' rights in the action.

Petitioners assert that the totality

of the foregoing reasonably equates to the fact that petitioners were methodically and affirmatively denied "due process of law" by the said Connecticut Courts in violation of Amendment XIV of the Constitution of the United States of America; and the foregoing eventuated, chiefly as a consequence of the Superior Court and the Supreme Court of Connecticut having wrongfully urged, condoned and permitted the respondents' collusive withdrawals of their respective complaints one against the other and as coupled with the court's plan to exclude petitioners' "Amended Answer and Counterclaim" from the action.

POINT VI.

PETITIONERS ASSERT THAT THE SUPERIOR COURT AND SUPREME COURT OF CONNECTICUT DEPRIVED PETITIONERS OF "DUE PROCESS OF LAW" IN VIOLATION OF AMENDMENT XIV OF THE UNITED STATES CONSTITUTION WHEN THEY ARBITRARILY AND ERRONEOUSLY RULED THAT THE PARTIES' VOLUNTARY STIPULATION OF SEPTEMBER 9, 1974 AS ENTERED ON THE RECORD IN OPEN COURT WAS NOT A PART OF THE SUBJECT PLEADINGS.

Petitioners assert that on September 9, 1974 all the parties involved in the subject litigation entered into a voluntary stipulation as appears on the record in open court, with the court participating as a party to the oral stipulation. The background facts as involved are comprehensively set out in Section 7) pp. 31 to 35 inclusive supra under "STATEMENT OF THE CASE".

Pertinently, the voluntary oral

agreement as was entered on the record in open court is set out clearly and succinctly in all its essential respects on Exhibit 5a attached. Said exhibit is a copy of respondent City of Norwalk's "MEMORANDUM IN SUPPORT OF MOTION TO STRIKE FROM THE JURY DOCKET" dated October 8, 1975.

The City's Corporation Counsel in essence stated that the stipulation recorded that the parties agreed, and the State Referee agreed, that State Referee P. B. O'Sullivan would hear and decide the entire case. The latter agreement was essential inasmuch as all parties had previously agreed: that petitioners' "Amended Answer and Counterclaim" as originally filed on June 18, 1973; and as previously disallowed by the Superior Court on July 20, 1973 (see POINT III

supra), would be reinstated in the subject action; that petitioners would withdraw their two pending derivative actions in the United States District Courts of Connecticut and Delaware; and said pending actions would thereafter be consolidated with the subject Civil Action No. 14326 by the reinstatement of petitioners' "Amended Answer and Counterclaim" as originally filed June 18, 1973. The foregoing inasmuch as each of the two federal actions paralleled the substance of the said June 18, 1973 "Amended Answer and Counterclaim". Also by the stipulation, agreement, the further trial of the primary action, and of the third-party action by the State Referee was to be continued on November 18, 1973. In addition it was agreed that the petitioners would forego their right to jury trial of their third-party action. The latter so that the

State Referee might then hear the entire action, and without a jury.

Pursuantly, the inception and factual background of the "Amended Answer and Counterclaim" matter, as alluded to in the paragraph next above, is set out under Section 5) pp. 25 to 30 inclusive, of the "STATEMENT OF THE CASE" supra. For brevity and because of its relevancy and materiality, the content thereof is included herein by reference as if set out verbatim. Similarily, the content of Section 19) and Section 20) pp. 46 to 48 inclusive are included by reference as if fully set out herein.

Pertinently, on March 16, 1976, the Superior Court, Hon. Harold H. Dean, Judge, ruled that the September 9, 1974 stipulation, as voluntarily made in open court on the record was not a valid stipulation, and that as a consequence, the

petitioners' "Amended Answer and Counter-claim" as had been filed on July 9, 1973, following its prior filing by motion on June 18, 1973, in accord with Sec. 132 of the Connecticut Practice Book, was not in the action. The foregoing following the court's interpretation of the stipulation; and was to the effect that the agreement did not in fact become operative on September 9, 1974, but was dependent upon future contingent acts of the parties.

The court's aforesaid interpretation and ruling were to the effect that the stipulation of September 9, 1974 was not valid and of no effect and was most critical to the ultimate disposition of the case for the following reason:

If the stipulation of September 9, 1974 is valid as claimed by the petitioners, and in reliance upon which stipulation petitioners had changed their posi-

tion in the action, as is set out under Sections 19) and 20), pp. 46 to 48 inclusive of "STATEMENT OF THE CASE"; and which are included herein by reference, the "Amended Answer and Counterclaim" filed July 9, 1973 is in the action, and despite the collusive withdrawal of respondents' actions one against the other, as under POINT V supra, would have kept the entire action before the court; and the court could not have subsequently finally ruled "there is nothing for the court to try".

However, if the "Amended Answer and Counterclaim" were not in the case then, and totally aside from the saving impact of Section 52-80, of the General Statutes of Connecticut, the court might have ruled "there is nothing for the court to try". Clearly, the court was intent on eliminating petitioners' "Amended Answer and

Counterclaim" from the pleadings; and all as set out under "POINT V" supra.

At this juncture and as pertinent to the validity of said stipulation, petitioners pertinently contend that the law is clear as to the validity of the September 9, 1974 stipulation as was entered on the record in open court, and with the court participating in the agreement (see Exhibit 5a). At the outset, the Supreme Court of the United States has ruled as to:

THE BINDING EFFECT OF ORAL STIPULATIONS

of the parties in the presence of the court are generally held to be binding, especially when acted on or entered on the court records as in the case at bar. Lewis v. Wilson, 151 U.S. 551, 38 L. Ed. 267, 14 S. Ct. 419.

Stipulations as made by parties to a judicial proceeding, or by their attorneys, within the scope of their authority, are binding upon those who make them, and those whom they lawfully represent, and also upon the trial and appellate courts, in the absense of any valid ground or reason for refusing enforcement. They cannot be contradicted by evidence tending to show the facts to be otherwise. On appeal, neither party will be heard to suggest the facts were other than as stipulated, or that any material fact was omitted. Hackfield v. United States, 197 U.S. 442, 49 L. Ed. 826, 25 S. Ct. 456.

The rule is generally recognized that parties to a suit, or their attorneys, may enter into a valid agreement that the judgment or decree in that suit shall be the same as, or determined by the judgment or decree in, another which is of the same character and involves the same issues or interests. Knott v. St. Louis Southwestern RR Co. 230 U.S. 509, 57 L. Ed. 1595, 33 S. Ct. 984.

A STIPULATION IS A JUDICIAL ADMISSION

Consisting of abandonment of any contention to the contrary, and one who has stipulated to certain facts is foreclosed from repudiating them on appeal. Wolf Corp. v. Louis, 464 P. 2d 672, 675, 11 Ariz. App. 352.

It is in effect an agreement or admission made in a judicial proceeding by parties in response to some matter incident to proceedings for purpose of avoiding delay, trouble and expense. Application of Wilmington Suburban Water Corp., Del Super. 203 A 2d 816, 832., also:

The stipulation of September 9, 1974, supra as made and recorded in open court, under Connecticut law, constituted a contract between the parties involved. Subsequently, however, respondent Amercoat, Section 7) pp. 31 to 35 inclusive

supra, unilaterally breached the said stipulation (contract), which had become the law of the case; namely:

> "The court with jurisdiction of the subject matter of an action has inherent power to enter judgment in that action by stipulation. Such a judgment is not a judicial determination of a litigated right but the embodiment of a contract in a form which places the matters covered by it beyond further controversy. If the judgment conforms to the stipulation it cannot be altered or set aside unless the stipulation was obtained by fraud, accident or mistake." Byron v. Reynolds, 143 Conn. 456.

Petitioners assert that in accord with the totality of the foregoing, the Connecticut Courts supra have by their involved arbitrary and erroneous decisions of applicable law, as dissimulatively made to avoid a trial of the actions and concurrently to collapse petitioners' actions herein, "POINT V" supra, have deprived petitioners of "due process of law"

in violation of Amendment XIV of the Constitution of the United States of America and such to petitioners' great damage.

POINT VII.

PETITIONERS ASSERT THAT THE SUPREME COURT OF CONNECTICUT DEPRIVED PETITIONERS OF "DUE PROCESS OF LAW" IN VIOLATION OF AMENDMENT XIV OF THE UNITED STATES CONSTITUTION WHEN IT ARBITRARILY AND UNREASONABLY GRANTED RESPONDENT AMERCOAT'S MOTION TO DISMISS PETITIONERS' APPEAL, AND THEREBY PRECLUDED PETITIONERS FROM RECEIVING A FAIR OPPORTUNITY TO HAVE THE CASE HEARD ON APPEAL

Petitioners assert that on March 16, 1976, the Supreme Court, Hon. Harold H. Dean, Judge, made its final decision in the subject action; namely: "...there is nothing for the court to try". On March 23, 1976, petitioners filed their combination "MOTION FOR REARGUMENT", and their most comprehensive "MEMORANDUM IN

SUPPORT". On April 1, 1976, the Superior Court, Hon. Harold H. Dean, Judge, summarily denied petitioners' motion for reargument.

As of April 1, 1976, petitioners had twenty days to appeal the Court's denial of reargument - Sec. 600 - Right of Appeal and Sec. 601 - Time to Appeal; Extension, of the Connecticut Practice Book. On April 12, 1976, petitioners filed their appeal to the Supreme Court of Connecticut.

On April 26, 1976, respondent Amercoat Corporation belatedly filed its "MOTION TO DISMISS". Petitioners took timely exception to respondent Amercoat's late filing of its "MOTION TO DISMISS". However, the Supreme Court elected to disregard the applicable mandate of Sec. 697 of the Connecticut Practice Book.

On May 14, 1976, the Superior Court granted petitioners' "MOTION FOR EXTENSION OF TIME" to May 31, 1976, to file their brief as in opposition to respondent Amercoat's "MOTION TO DISMISS" supra. Said extension of time had been requested because of petitioners' series of repetitive but unsuccessful efforts to secure from the Court Clerk the essential record of decisions etc. as had been made in the subject action; and specifically covering the critical period December 3, 1975 to April 3, 1976 inclusive. The foregoing requested record had been sought in accord with the applicable provisions of Sec. 51-53 - Court Clerks, of the Connecticut General Statutes, and as specifically detailed under Sec. 317 - Notices to Referees and Attorneys, of the Connecticut Practice Book.

Pursuant to the foregoing, petitioners made all possible efforts to secure the Court Clerk's compliance with the Sec. 317 provisions, and as including copies of all judgments, nonsuits, defaults, decisions, orders and rulings as had been duly made in the subject action. The foregoing so that petitioners might adequately prepare their appeal to the Supreme Court in accord with Sec. 600 of the Connecticut Practice Book, and as specifically reflecting that portion of Sec. 317 which provides in pertinent part:

"In case of appellate proceedings thereon, the time limited by law for commencing such proceedings shall date from the time such notice is issued by the clerk."

Pertinently, the foregoing rule was

therebefore interpreted by the Supreme Court of Connecticut--directly on point--as requiring the Court Clerk's adherence to its literal provisions. Tilo Co. v. Joseph Fishman 164 Conn. 212.

However, the record shows the Clerk of the Superior Court repetitively refused to comply with this requirement, The reason for such refusal is not presently known. Following which refusals, the Superior Court Judge--who made the final ruling supra, "...there is nothing for the court to try"--also refused to instruct the Court Clerk to comply with the said mandatory provision supra. Finally, the petitioners filed their motion to have the Superior Court compel the Court Clerk to comply with Sec. 317 supra. No attention was paid the motion. It was not placed on the "Short Calendar" for hearing.

Apropos of the foregoing, all petitioners' efforts to obtain the essential decision etc. being futile, they finally addressed a letter dated June 26, 1976, Exhibit 8a, to the Presiding Judge of the Superior Court requesting his personal assistance in the matter. In said letter, petitioners made reference to their pertinent motion filed May 20, 1976, and which had not been duly placed on a "Short Calendar" for hearing. Neither said letter of June 26, 1976, nor its follow-up letter of September 27, 1976, was responded to by the Presiding Judge.

Pursuantly, petitioners--in their appeal to the Supreme Court as filed on April 12, 1976--had specifically reserved their right to supplement said appeal in accord with the provision of Sec. 317 as quoted, supra. Pertinently, petitioners

requested the Clerk of the Supreme Court, both before the hearing of the appeal, and subsequently--in the matter of their motion for reargument--to assist petitioners to secure the essential data. Every effort was futile.

On May 29, 1976, petitioners served their "BRIEF OF DEFENDANTS AND THIRD PARTY PLAINTIFFS....IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS"; and therein reserved their right to supplement their brief in regard to time, and content thereof. The foregoing as in accord with Sec. 317 of the Connecticut Practice Book and pertinently citing: Walsh v. Laffen 131 Conn. 359, MacArthur v. Cannon 4 Conn. Cir. Ct. 208, State v. Reddick 139 Conn. 400.

On October 5, 1976, a hearing on respondent Amercoat's "MOTION TO DISMISS" was heard by the Supreme Court; and the

Court subsequently issued its order granting plaintiff's motion; setting out that the decision had been made on October 13, 1976, There was no opinion...by the Supreme Court in support of its bare denial. The late filing of respondent Amercoat's "MOTION TO DISMISS" was patently disregarded.

On October 20, 1976 and October 22, 1976, petitioners timely filed their Motion for Reargument and Brief in Support etc. pertinent to the Supreme Court's granting of plaintiff's "MOTION TO DISMISS". The foregoing in accord with Sec. 702 - Motion to Reargue; Sec. 703 - Filing and Distribution; Contents; and Sec. 704 - Stay of Proceedings and Assignment for Reargument.

On November 3, 1976, the Supreme Court denied petitioners' "MOTION FOR

REARGUMENT" stating in part that plaintiff's "MOTION TO DISMISS" was granted on October 5, 1976, the date of its hearing and not on October 13, 1976, as indicated supra. No amplification nor opinion was supplied.

Pursuant to the foregoing, petitioners submit that the Supreme Court's perfunctory granting of respondent Amercoat's belated "MOTION TO DISMISS" was merely to get rid of the matter in accord with its pre-conceived and potentially related ex parte considerations, was extremely arbitrary, and was not made in "good faith". The proceedings were of a nature commonly characterized as "steamrollered" against petitioners. Petitioners' rights in the appeal were thus crushed by a ruthless disregard of their right to appeal, and a fair hearing of

their case. Their appeal was not to be argued on its merits.

An impartial hearing on the merits was precluded by the Court's arbitrary action--one that on its face, in view of the involved facts and law, constituted an abuse of discretion in that it was extremely difficult to see how reasoning, judicial minds could have reached their decisions on the basis of the evidence presented.

Petitioners assert that the appeal was scheduled or programmed to be denied from the outset and all for reasons presently unknown to these appellants, but the effect thereof was to preclude petitioners receiving a "fair opportunity to have a case heard on appeal": Connecticut General Statutes, Section 52-27, and Dudley v. Hull 105 Conn. 710, 719.

In consideration of the totality of the foregoing, petitioners submit they were deprived of their right to appeal by the arbitrary and wrongful decision of the Supreme Court of Connecticut, in denying their April 12, 1976 appeal out-of-hand; and that said arbitrary, unreasonable and erroneous denial of petitioners' rights constituted an affirmative abridgement of petitioners' right to "due process of law" as protected by Amendment XIV of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Connecticut.

Respectfully submitted,

EDMOND PFOTZER

and

E. JOHN PFOTZER

Petitioners pro se

Edmond Pfotzer

E. John Pfotzer

STATE OF CONNECTICUT
SUPERIOR COURT
COURT OF COMMON PLEAS
CLERK'S OFFICE, STAMFORD
John J. P. Ryan, Clerk

No 14326

Amercoat Corporation v.
Transamerica Insurance Company et al

November 3, 1976. The motion by the defendants E. John Pfotzer and Edmund (sic) Pfotzer to reargue the plaintiff's motion to dismiss the appeal which was granted October 5, 1976, is denied.

By the Court,

/s/ House
Chief Justice

EXHIBIT 2a

Amercoat Corporation v. Transamerica Insurance Company et al.

October 13, 1976. The plaintiff's motion to dismiss the appeal of the defendants Edmund (sic) and E. John Pfotzer from the Superior Court in Fairfield County at Stamford is granted.

By the Court,

/s/ House
Chief Justice

All parties notified on
Oct. 18, 1976
/s/ J.J.P.A.R.

EXHIBIT 1a

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

EDMOND PFOTZER, etc., et ano.:		
Plaintiffs,	:	Civil
v.	:	Action
Ameron, Inc.	:	No. 4768
Defendant.	:	

STIPULATION OF DISMISSAL

WHEREAS, there are presently pending three civil actions between the parties, based upon the same transaction or occurrence, namely Civil Action 14326 in the Superior Court of the State of Connecticut, Civil Action 4768 in the United States District Court for the District of Delaware, and Civil Action B-947 in the United States District Court for the District of Connecticut, and

WHEREAS, the parties are in dispute as to the terms of a stipulation entered into in one of these actions, Civil Action 14326 in the Superior Court of the State of Connecticut on September 9, 1974, and

WHEREAS, the parties desire to dismiss the actions presently pending in the United States District Court for the District of Delaware and the United States District Court of Connecticut with prejudice to the prosecution of these or any other actions arising out of the aforesaid transaction or occurrence, notwithstanding the eventual determination, whatever that may be, of the terms of said stipulation, but without prejudice to the prosecution of such claims as is presented in Civil Action 4768 and in Civil Action B-947, supra, in Civil Action 14326 in the Superior Court of the State of Connecticut,

NOW THEREFORE it is hereby stipula-

ted and agreed by and between the undersigned that this action hereby is dismissed, with prejudice to the prosecution of this or any other action based on the transaction or occurrence alleged in Civil Action 4768 in the United States District Court for the District of Delaware and Civil Action B-947 in the United States District Court for the District of Connecticut, but without prejudice to the prosecution of such claim in Civil Action 14326 in the Superior Court of the State of Connecticut, said costs to be determined in accord with the applicable Federal Rules of Civil Procedure and Federal Statutes.

DATED:
November 7th, 1974

E. John Pfotzer
Plaintiff pro se

EDMOND PFOTZER
Plaintiff, pro se

Prickett, Ward, Burt & Sanders

/s/ BY Jan S. Black

1310 King Street
Wilmington, Delaware

So Ordered this 7th day of November, 1974

/s/ Steel

CERTIFIED
AS A TRUE COPY:
ATTEST:
EVAN L. BARNEY, Clerk

By Joseph J. Coll /s/
Deputy Clerk

EXHIBIT 3a

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

EDMOND PFOTZER, etc., et ano.:		
Plaintiffs,	:	Civil Action No.
v.	:	
AMERCOAT CORPORATION, and AMERON, INC.,	:	B-947
Defendant.	:	

STIPULATION OF DISMISSAL

WHEREAS, there are presently pending three civil actions between the parties, based upon the same transaction or occurrence, namely Civil Action 14326 in the Superior Court of the State of Connecticut, Civil Action 4768 in the United States District Court for the District of Delaware, and Civil Action B-947 in the United States District Court for the District of Connecticut, and

WHEREAS, the parties are in dispute as to the terms of a stipulation entered into in one of these actions, Civil Action 14326 in the Superior Court of the State of Connecticut on September 9, 1974, and

WHEREAS, the parties desire to dismiss the actions presently pending in the United States District Court for the District of Delaware and the United States District Court for the District of Connecticut with prejudice to the prosecution of these or any other actions arising out of the aforesaid transaction or occurrence, notwithstanding the eventual determination, whatever that may be, of the terms of said stipulation, but without prejudice to the prosecution of such claim as is presented in Civil Action 4768 and in Civil Action B-947, supra, in Civil Action 14326 in the Superior Court of the State

of Connecticut,

NOW THEREFORE it is hereby stipulated and agreed by and between the undersigned that this action hereby is dismissed, with prejudice to the prosecution of this or any other action based on the transaction or occurrence alleged in Civil Action 4768 in the United States District Court for the District of Delaware and Civil Action B-947 in the United States District Court for the District of Connecticut, but without prejudice to the prosecution of such claim in Civil Action 14326 in the Superior Court of the State of Connecticut, with costs to abide the determination of Civil Action 14327 in the Superior Court of the State of Connecticut, said costs to be determined in accord with the applicable Federal Rules of Civil Procedure and Federal Statutes.

DATED: November 11, 1974

/s/ E. John Pfotzer
E. JOHN PFOTZER
Plaintiff pro se

/s/ Edmond Pfotzer
EDMOND PFOTZER
Plaintiff pro se

Maher & Maher

/s/ BY Kevin J. Maher
KEVIN J. MAHER
P. O. Box 269
Bridgeport, Conn.
06601

SO ORDERED this 13 day of November, 1974.

/s/ John O. Newman
J.

FILED
NOV 13 12:41PM '74
U.S.D.C. - NEW HAVEN, CONN.

EXHIBIT 4a

No. 14326

AMERCOAT CORPORATION

vs.

TRANSAMERICA CORPORATION, ET AL

SUPERIOR COURT (AT STAMFORD)

COUNTY OF FAIRFIELD

OCTOBER 8, 1975

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE FROM THE JURY DOCKET

OFFICE OF CORPORATION COUNSEL
Norwalk, Connecticut 06856

The City of Norwalk respectfully draws the Court's attention to the Stipulation contained in the attached transcript of proceedings before Judge P. B. O'Sullivan Referee, in this matter on September 9, 1974. On Page X-1 the Court stated the Stipulation substantially as follows:

> "...the parties who are in litigation before me...agree that the various pieces of litigation in the system that is in controversy between you gentlemen are to be given to me to handle and solve, and that the two federal cases... are to be withdrawn because they cover the same matters that I will be called upon to decide."

This statement was agreed to by the City of Norwalk (Page X-1), by Amercoat (Page X-2), and by Mr. Pfotzer (pp. X-2 and X-3). The Stipulation included an agreement that all positions and issues that any of the parties wished to raise would be admitted. See Mr. Lessin's remarks at Page X-5 and Page X-10.

Pursuant to this agreement the Pfotzer brothers withdrew their Federal Court actions.

Subsequently, Judge O'Sullivan withdrew from the case for reasons not connected to the Stipulation. (See attached letter of Judge O'Sullivan dated October 22, 1974.)

A waiver is an intentional relinquishment of a known right. Whether a party has waived his right to a jury trial presents a question of fact for the trial court. Krupa v. Farmington

OFFICE OF CORPORATION COUNSEL
Norwalk, Connecticut 06856

OFFICE OF CORPORATION COUNSEL Norwalk, Connecticut 06856

River Power Company, 147 Conn. 153, at 156 (1959). In the present matter the Pfotzer brothers agreed to waive their right to a jury trial. Although not explicitly stated in the transcript, it may be surmised that this relinquishment was in return for the privilege of presenting all of their claims, including their counterclaim against Amercoat, to Judge O'Sullivan. The Federal Court actions were withdrawn pursuant to this agreement, and also the litigation did not progress on the jury trial docket for almost a year.

The fact that Judge O'Sullivan personally was unable to hear the matter may not properly be regarded as a reason for discounting the waiver of trial by jury. To hold otherwise would be to recognize that the hearing of a matter before a particular judge can be considered by the Court in the nature of contractual consideration. The situation here, as in the Krupa case, is that a mistrial* developed after the waiver of jury trial. In Krupa our Supreme Court upheld the trial court's ruling that the case should not be assigned to a jury upon the retrial.

If the Court agrees that the jury trial has been waived by the above circumstances, fundamental fairness would seem to call for the Pfotzer brouthers to be accorded the right to present matters raised by their Motion of June 18, 1973, since the Pfotzer brothers withdrew their Federal actions in reliance upon this

*Strictly speaking, no mistrial was entered in the referred proceeding before Judge O'Sullivan. Judge O'Sullivan simply refused the reference. A mistrial seems to be as close an analogy as is available however.

anticipated privilege granted by Judge O'Sullivan.

Accordingly, in the exercise of its procedural powers, the Court is requested to order a trial to the Court of all issues. For the sake of economy of the time of the parties and counsel, it is suggested that the Court first order a trial of the issues concerning the alleged misrepresentations as to the pipe as requested by the City's Motion for Separate Trial filed concurrently herewith.

RESPECTFULLY SUBMITTED,

THE DEFENDANT, CITY OF NORWALK

By: _____
Arthur J. Goldblatt,
Its Attorney

THIS IS TO CERTIFY that copy was mailed to all parties of record this day.

_____
Arthur J. Goldblatt

EXHIBIT 5a

OFFICE OF CORPORATION COUNSEL Norwalk, Connecticut 06856

No. 14326

AMERCOAT CORPORATION

vs.

TRANSAMERICA CORPORATION, ET AL

SUPERIOR COURT (AT STAMFORD)

COUNTY OF FAIRFIELD

OCTOBER 8, 1975

MOTION TO STRIKE FROM THE JURY DOCKET

Now comes the CITY OF NORWALK and respectfully requests the Court to strike the captioned case from the jury docket for the reason that the Third Party Plaintiff, E. & E. J. Pfotzer, whose claim it was that this matter be tried before a jury, has waived such claim by reason of its Stipulation in open court for a trial of all issues to the Referee, a copy of which is attached hereto.

THE DEFENDANT, CITY OF NORWALK

By: _____
Arthur J. Goldblatt, Its
Attorney

OFFICE OF CORPORATION COUNSEL Norwalk, Connecticut 06856

OFFICE OF CORPORATION COUNSEL Norwalk, Connecticut 06856

THIS IS TO CERTIFY that copy was mailed to all parties of record this day.

Arthur J. Goldblatt

EXHIBIT 5a

No. 14326

AMERCOAT CORPORATION	SUPERIOR COURT (AT STAMFORD)
vs.	COUNTY OF FAIRFIELD
TRANSAMERICA INSURANCE COMPANY ET ALS	MARCH 3, 1976

WITHDRAWAL OF COUNTERCLAIM

The counterclaim of the City of Norwalk against E. & E. J. Pfotzer in the above-entitled matter is hereby withdrawn.

THE DEFENDANT, CITY OF NORWALK

BY: Robert G. Zanesky,
Its Attorney

THIS IS TO CERTIFY that copies were given to counsel of record.

Robert G. Zanesky

EXHIBIT 6a

RECEIPT FOR CERTIFIED MAIL—20¢

No. 253134

SENT TO: Jessica

STREET AND NO.: Hewitt

CITY, STATE, AND ZIP CODE:

POSTMARK OR DATE: 6/18/73 1:45 pm

EXTRA SERVICES FOR ADDITIONAL FEES

Return Receipt Shows to whom and when delivered — 10¢ fee

Shows to whom, when, and where delivered — 35¢ fee

Deliver to Addressee Only — 50¢ fee

P.O. Form 3800 Rev. 1971 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL. (See other side)

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address where delivered

☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.

CERTIFIED NO. 753134

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in) 1 [illegible] & Connery

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY 2 [illegible] Baldie

DATE DELIVERED JUN 19 1973

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

1 Slavitt & Connery

2 Leo Baldie

N.B. MOTION PAPERS ETC. ARE REFERENCED TO THE RECORD

EXHIBIT 7a

E. & E. J. PFOTZER
Contractors

Post Office Box 987
Wilmington, Delaware 19899

June 26, 1976

Presiding Judge
Superior Court of Connecticut (Stamford)
15 Hoyt St., Ext.,
Stamford, Connecticut

Re: Civil Action No. 14326;
Amercoat Corporation vs.
Transamerica Insurance Co., et al

Dear Sir:

This is to respectfully advise that we presently find it necessary to request your assistance in timely moving the following matter forward, namely:

(1) By letter dated May 14, 1976 (copy attached) we were informed by the Clerk of the Court that he was unable to accomodate our requests for his compliance with Section 317 of the Connecticut Practice Book. The prior correspondence file is a matter of record in his office.

(2) Pursuantly, in response to the final paragraph of his letter, supra, we duly filed our motion dated May 20, 1976, captioned:

"MOTION TO HAVE THE CLERK OF THE COURT SUPPLY NOTICES ETC. TO MOVANTS AS REQUIRED BY SECTION 317 OF THE CONNECTICUT PRACTICE BOOK"
(See Docket File)

The record shows, to this date, said motion has not been placed upon a "Short Calendar" for hearing if such is required under the attendant circumstances. However, inasmuch as the matter involved is of extreme importance, and urgency to these defendants' vital interests in the subject litigation it has now become necessary that we request your timely intercession in our endeavor to have the issue involved duly considered and decision rendered.

EXHIBIT 8a

Presiding Judge
Superior Court of Connecticut
June 26, 1976

In addition your attention is respectfully invited to the fact that as a direct consequence of plaintiff's motion to dismiss defendants' appeal filed April 12, 1976, and absent the Clerk's timely compliance with the clear intent of Section 317 of the Connecticut Practice Book, these defendants were not only compelled to defensively respond to plaintiff's motion to dismiss defendant's appeal, but were from the outset greatly handicapped in the matter of adequately presenting their pending appeal to the Supreme Court. To the end that the Court may be aware of how defendants evaluate this matter they are attaching as Exhibit A, a copy of pages 12 and 13 of their "ARGUMENT - POINT I", contained in "BRIEF . . . IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS APPEAL", and which in substance outlines the subject matter of this letter.

In consideration of the totality of the foregoing you are requested to endeavor to have the subject motion timely heard or otherwise considered to the end that this ancient litigation may move procedurally forward.

Thank you for your anticipated assistance.

Very truly yours,

/s/ E. John Pfotzer
E. John Pfotzer

cc: Hon. Harold H. Dean, Judge
Clerk of the Court

EXHIBIT 8a